83-1698

No. ____________

IN THE

Supreme Court of the United States

October Term, 1983

D. E. ROGERS ASSOCIATES, INC., and
MICHIGAN SPECIALTIES MANUFACTURING COMPANY,
Petitioners,

v.

GARDNER-DENVER COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I.

WHETHER A CLAIM OF PRICE DISCRIMINATION UNDER § 2(a) OF THE ROBINSON-PATMAN ACT, 15 U.S.C. § 13(a), CAN ONLY BE MADE OUT ON EXACTLY THE SAME PROOF AS WOULD SUPPORT A CLAIM OF MONOPOLIZATION OR ATTEMPT TO MONOPOLIZE UNDER § 2 OF THE SHERMAN ACT, 15 U.S.C. § 2, BASED ON PREDATORY PRICING.

II.

WHETHER THE COURT OF APPEALS PANEL IN THIS CASE PROPERLY APPLIED A COST-BASED TEST IN DETERMINING WHETHER THE DEFENDANT ENTERTAINED THE REQUISITE INTENT TO COMMIT MONOPOLIZATION OR AN ATTEMPT TO MONOPOLIZE IN VIOLATION OF § 2 OF THE SHERMAN ACT, 15 U.S.C. § 2.

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The petitioners D. E. Rogers Associates, Inc. and Michigan Specialties Manufacturing Company, Inc. (hereinafter collectively "Rogers")[1] respectfully request that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit entered on October 21, 1983.

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[1] During the 1971-76 period relevant to the complaint, petitioners D. E. Rogers Associates, Inc. and Michigan Specialties Manufacturing Company, Inc. were related Michigan corporations located in Troy, Michigan. Michigan Specialties manufactured many of the products sold by D. E. Rogers. Michigan Specialties was merged into D. E. Rogers Associates, Inc. in 1979. Rogers is affiliated through a partial common ownership with D&D Production, Inc., a Michigan corporation.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 718 F.2d 1431. It also appears in the Appendix hereto at A-1 to A-16.[2] The district court rendered an oral opinion on March 31, 1981, the transcript of which appears at A-19 to A-30 and at J. App 782-800. The district court opinion is unofficially reported at 1981-1 Trade Cas. (CCH) ¶ 64,024.

JURISDICTION

The judgment of the Court of Appeals was entered on October 21, 1983. Rogers' petition for rehearing and suggestion for rehearing *en banc* were denied on January 18, 1984. A-18. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This suit involved application of Section 2 of the Sherman Act, 15 U.S.C. § 2, and § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a). These provisions appear at A-32.

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[2] Citations to the Appendix to this petition are in the above form. The Joint Appendix in the Court of Appeals is cited as "J. App.".

STATEMENT OF THE CASE

Synopsis

Gardner-Denver for years had enjoyed a monopoly position, originally founded on a patent, in the rachet wrench tool and parts markets. In the early 1970s, Gardner-Denver became concerned about the inroads into its position being made by Rogers, which Gardner-Denver considered to be a "pirate" manufacturer of replacement parts for defendant's ratchet wrenches. Gardner-Denver responded by selectively undercutting Rogers' prices through a secret "blue list." Gardner-Denver did not simply meet Rogers' prices, but substantially undercut those prices on two separate occasions. The selective price-cuts were limited to the parts Rogers produced and were aimed directly at Rogers. Gardner-Denver's actions caused severe losses in volume and profit to Rogers, forced another small competitor, Transpneumatic, completely out of the market, and deterred a large potential competitor, Ingersoll-Rand, from entering the market.

This matter went to trial on Rogers' claims that Gardner-Denver's actions were an unreasonable restraint of trade and constituted monopolization and an attempt to monopolize in violation of § 2 of the Sherman Act, 15 U.S.C. § 2, and constituted price discrimination in violation of the Robinson-Patman Act, 15 U.S.C. § 13(a). At the close of Rogers' proofs, the district court dismissed Rogers' monopolization and attempt to monopolize claims on several grounds, not all of which were addressed by the Sixth Circuit panel. First, the panel held that the district court's finding that there was insufficient direct evidence of predatory intent was not clearly erroneous. Second, the panel concluded that Rogers had failed to establish predatory intent by implication through proof that

Gardner-Denver had priced its product below its average variable costs or marginal costs. Third, the panel affirmed the district court's dismissal of Rogers' price discrimination claim on the ground that, at least in the absence of a detailed market study, the requisite likelihood of anticompetitive effect could be made out only through proof of predatory pricing which would also make out a monopolization or attempt to monopolize claim under § 2 of the Sherman Act, 15 U.S.C. § 2. The panel thus held that where a plaintiff "seeks to prove anticompetitive effect inferentially from proof of anticompetitive intent, . . . proof of anticompetitive intent in Section 2(a) cases is no different from its proof in Sherman Act cases." 718 F.2d at 1439, A-15.

The Parties And Market Share

D. E. Rogers Associates, Inc., was founded in 1964 by Donald Rogers, a former Gardner-Denver employee. Rogers entered business by manufacturing and selling replacement parts for Gardner-Denver ratchet wrenches[3] at attractive prices. By reinvesting its modest profits, Rogers was able by 1970 to offer a complete line of ratchet wrench parts and complete attachments. It later began marketing some complete ratchet wrenches.

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[3] A ratchet wrench, as that term is used herein, is a particular species of a broad class of pneumatic "nutsetters", hand-held compressed air-powered industrial tools which tighten nuts onto bolts or studs. A ratchet wrench consists both of a motor and an attachment. An attachment, in turn, consists of various parts including a socket, side plate, panel and push rod (J. App. 31, 67-73). The ratchet wrench is used primarily in assembly operations such as the automobile industry. It is a unique special purpose tool capable of working in areas with much more limited access than other pneumatic nutsetters and differs from other types of nutsetters in terms of speed, torque, cost, size and other characteristics. As a result of its unique design, however, the ratchet wrench has a slow recycle time, wears out quickly and is high in maintenance cost. Customers therefore do not use the ratchet wrench unless the particular assembly operation allows no alternative tool to be utilized (J. App. 73-87, 105-06, 142-43, 198-200, 237-37).

During the 1971-76 period, defendant Gardner-Denver Company was a Delaware corporation engaged in the production and marketing of a broad range of industrial tools.[4] In 1955, Gardner-Denver had acquired Keller Tool Company, which had held a monopoly on ratchet wrench production as the sole holder of patents which expired that same year. Gardner-Denver has remained the industry leader in ratchet wrenches and parts. During the period in issue, Gardner-Denver sold about 80 percent of all ratchet wrenches and replacement parts in the United States (J. App. 774-75, 778-79, 789). Gardner-Denver's market position in both parts and whole tools was entrenched by a number of factors.[5] While several other companies produced very limited lines of ratchet wrenches and parts at some time relevant to this action, only Rogers and

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[4] In or about 1980, Gardner-Denver was acquired by and merged into Cooper Industries, Inc.

[5] These factors include Gardner-Denver's well-developed sales organization, market acceptance, image of quality, registrations with customers, and the fact that it has always offered a line of complete tools (J. App. 103-04, 410, 415, 424, 780-781). A particular barrier to entry was posed by the purchasing practices of ratchet wrench customers. A number of large customers, including the "big three" auto manufacturers and the large automotive industry suppliers, authorize the purchase of repair parts only through "blanket orders". These "blanket orders" have proven difficult for small new suppliers such as Rogers to obtain (J. App. 104-05, 266-70, 780-81). In addition, even when a blanket order has been obtained or where it is not required, ratchet wrench customers generally purchase only the tools and parts listed on "tool crib cards" maintained by factory production personnel. It has proven difficult for Rogers and other small suppliers to get these cards updated to reflect them as suppliers, particularly during the period of Gardner-Denver's price reductions (J. App. 87-90, 249-51, 259, 267-71). Rogers was also handicapped in its efforts to enter the whole tool market by the unavailability of a suitable motor at a reasonable price, and by Gardner-Denver's refusal to sell it such a motor (Exhibits 89, 102; J. App. 137-39, 145-50, 427-28).

Gardner-Denver have marketed complete lines of ratchet wrench tools and parts (J. App. 98-102, 234-41, 277-78, 426).[6]

Gardner-Denver's Anticompetitive Actions

While Gardner-Denver had been concerned since at least 1966 (see Exhibit 36; J. App. 394) about what its officials viewed as "encroachment" of a "pirate" manufacturer on "our ratchet wrench business" (Exhibit 6; J. App. 390), it first reacted to punish this "pirate" in 1970 by declining a normal increase in ratchet wrench prices while increasing the prices on all of its other product lines. When Rogers continued to make sales and introduce new products, Gardner-Denver adopted a more punishing strategy. In August 1971, after comparing its prices with Rogers' and calculating its losses if it reduced prices (Exhibits 57, 58; J. App. 401-08), Gardner-Denver introduced a secret "blue" price list for ratchet wrench parts at prices below those of Rogers while maintaining its public "white" list at the prior prices. Gardner-Denver's sales manager admitted the company made no effort to justify its blue list price reduction or its selection of the number five for the volume discount in terms of cost economics (J. App. 705).

The blue list covered only ratchet wrench parts and included only those parts offered by Rogers (J. App. 32, 119-20, 216, 429-55). Unlike the white list, the blue list was distributed only to Gardner-Denver employees, and not to customers (J. App. 706-07, 750). Its stated purpose was to improve Gardner-Denver's position with "pirate part

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[6] The district court defined the relevant market to include *all* power-driven nutsetters, and concluded that Gardner-Denver lacked sufficient power in such market to commit the § 2 violations alleged (J. App. 787-90, A-21-24). On appeal, Rogers argued that this holding was unsupported by adequate findings of subsidiary fact, and was contrary to the decisions of this Court respecting submarkets. The Sixth Circuit did not reach this issue.

manufacturers" (Exhibit 26; J. App. 392). Significantly, orders for parts at the blue list prices had to be specifically marked "quoted" or the regular price would be charged (*id*). Rogers' prices had averaged about 70% of Gardner-Denver's white list prices and the blue list prices averaged about 61% of the white list prices (Exhibit 145; Exhibit 148, Schedules A-1 - A-3; J. App. 429-55, 462-64).

Gardner-Denver sales personnel reported the success of this strategy in diverting sales from Rogers to Gardner-Denver. For example, an internal memorandum reflects that "[s]ince Ford [Motor Company] was made aware" of the blue list it "ceased purchasing all copies of Gardner-Denver ratchet parts" and determined "to buy G.D. parts exclusively" (Exhibit 64; J. App. 410). Donald Rogers testified to the drastic effect the blue list had on his sales and his compelled decision to cut his prices in response on September 29, 1971 to approximately 55% of the white list price, just below the blue list price. Gardner-Denver again cut its blue list prices below Rogers on February 23, 1972, while at the same time increasing its white list prices. Rogers again was forced to reduce his prices to meet the blue list price on March 15, 1972. The blue list prices and Rogers' prices were stabilized at an average of 48% of the white list prices. Gardner-Denver maintained this dual price structure until September 1976 (Exhibits 28, 145; J. App. 32-33, 393, 429-55).

Because the blue list was not distributed to customers and applied only to invoices marked "quoted", Rogers had to meet the blue list price but Gardner-Denver could charge all of its customers on whom Rogers did not call the white list price. Even though it was cheaper to buy five parts at the blue list price than three parts at the white list price, an analysis of Gardner-Denver's sales invoices performed by Rogers' expert accountant disclosed that in 1975 white list prices were charged 24% of the time when five or more parts were ordered, that blue list prices were

charged 22% of the time when fewer than five parts were ordered, and that many buyers purchased in patterns which indicated that they were unaware of the blue list prices (Exhibit 197; J. App. 317-28, 474-80).

Gardner-Denver's Costs

Rogers' expert accountant, Edward M. Parks, testified extensively regarding the relationships between Gardner-Denver's prices and costs. Based on a review of Gardner-Denver's records and deposition testimony of its officers, Parks found that Gardner-Denver had no adequate system for determining the costs associated with ratchet wrench replacement parts during the 1971-76 period, and had not at any relevant time attempted to determine the profitability of this product line (J. App. 294-97, 377-78). Instead, Gardner-Denver utilized accounting conventions which allocated only a portion of the actual overhead costs to the ratchet wrench product line, and which Gardner-Denver knew to be flawed (J. App. 295-97, 368). Parks concluded that when costs were fully and properly allocated, defendant's blue list prices during the period February 1972 through September 1976 were in the area of his "accountant's" determination of average variable cost (J. App. 304-07).[7] Thus, by pricing at that level, Gardner-Denver failed to recover any of its fixed costs or imputed cost of capital, and failed to earn any profit (J. App 309-13, 456).

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[7] Mr. Parks defined "variable costs" as those costs which would vary with a given increase or decrease in production. Both "marginal" and "average variable" costs are variable costs. The former consist of those variable costs which would be incurred by producing an additional unit or units of output. "Average variable costs" are the sum of all variable costs over some given time period divided by output. "Fixed costs," in contrast, are those costs which do not vary with a change in output; and include the "opportunity cost" or a reasonable return on invested capital. "Average cost" or average total cost is the sum of all the variable and fixed costs over a given period divided by output (J. App. 299-300, 472).

Parks further testified that had he utilized a more inclusive "economist's" definition of variable costs like that advocated by professors Areeda and Turner[8], about half of what he considered fixed costs would instead be variable costs. Thus, by Areeda and Turner's definition, Gardner-Denver's blue list prices were substantially below the level of average variable costs throughout the entire period that list was in effect, August 1971 through September 1976 (J. App. 306-07, 313-14, 386-89). Moreover, Parks testified that Gardner-Denver's blue list prices throughout that period were substantially below its average total costs (J. App. 312-14).

Anticompetitive Impact And Rogers' Damages

It was uncontradicted that the Gardner-Denver blue list had a significant and immediate negative effect on Rogers' sales. While subsequent increases in the blue list prices ameliorated this effect, it continued until the blue list was discontinued in September 1976 (J. App. 111-30, 209-10, 215-19, 257, 262-63, 266-67).[9] The evidence also showed that the existence of the blue list caused at least one other small competitor, Transpneumatic, to abandon the market, and deterred a large potential competitor, Ingersoll-Rand, which was planning to enter the market, from entering the market (J. App. 246-48, 752-55).

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[8] Areeda and Turner's definition of variable and fixed costs differs from that utilized by Mr. Parks: they consider to be variable any costs which would be avoided if the production of the commodity was completely discontinued. They consider all other costs to be fixed. 3 D. Areeda & D. Turner, *Antitrust Law* ¶ 712 at 172-74 (1978); Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697, 700 (1975).

[9] Mr. Parks testified that forced reduction in Rogers' price below the previous competitive level, inability to make a normal 10% price increase in 1974, failure to attain normal growth and inability to make use of its lost profits during the period through December 1977 had resulted in total untrebled damages of $912,169.

(continued on following page)

Proceedings

Rogers' complaint, filed August 12, 1974, alleged in relevant part that Gardner-Denver's pricing and related actions were an unreasonable restraint of trade and constituted monopolization of and an attempt to monopolize the markets for ratchet wrench replacement parts and attachments in violation of § 2 of the Sherman Act, 15 U.S.C. § 2, and constituted price discrimination in violation of § 2(a) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a).[10]

The district court granted Gardner-Denver's motion to dismiss Rogers' claims at the close of Rogers' proofs pursuant to Fed. R. Civ. P. 41(b) (J. App. 782, A-31). In essence, the district court held (1) that Rogers had failed to establish a relevant product market in which Gardner-Denver had the necessary market power to commit a § 2 offense; (2) that Rogers had failed to prove predatory intent by direct evidence; (3) that Rogers had failed to establish predatory intent by proof that Gardner-Denver had priced below its average variable costs throughout the entire period the blue list was in

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(continued from preceding page)

The district court concluded that Rogers had failed to satisfy its burden of proving damages because Rogers had other difficulties during the 1971-76 period which produced some or all of the losses complained of. On appeal, Rogers argued that the district court had improperly ignored the legal distinction between *fact* of injury (which was essentially undisputed) and *amount* of damage (which need not be proven with exactness), and had erroneously required Rogers to prove that Gardner-Denver's actions were the *sole* cause of any financial losses it suffered. This issue was not addressed by the Sixth Circuit.

[10] A claim that certain of Gardner-Denver's actions were unlawful *per se* and pendent state law claims were dismissed before trial, and are not at issue herein.

effect, which the court found to be fatal to both the monopolization and price discrimination claims; and (4) that Rogers had failed to show that it had suffered compensable damage as a result of Gardner-Denver's actions.

The Sixth Circuit panel addressed only the second and third of these grounds. First, the panel held that the district court's finding that there was insufficient direct evidence of predatory intent was not clearly erroneous. 718 F.2d at 1435, 1439, A-6, 14. Second, the panel concluded that Rogers had failed to establish predatory intent by implication through proof that Gardner-Denver had priced its products below its average variable or marginal costs. 718 F.2d at 1435-38, A-7-13. Third, the panel affirmed the district court's dismissal of Rogers' price discrimination claim on the ground that, at least in the absence of a detailed market study, the requisite anticompetitive effect for a price discrimination claim could be made out only through proof of predatory pricing which would also make out a monopolization or attempt to monopolize claim under § 2 of the Sherman Act, 15 U.S.C. § 2. 718 F.2d at 1438-40, A-13-16.

REASONS FOR GRANTING THE WRIT

Review by this Court is necessary to resolve two issues of paramount importance to the federal antitrust law.

First, Rogers submits that the panel's holding that the proofs necessary to establish a price discrimination claim are identical to those necessary to establish a § 2 claim based on predatory pricing is in conflict with controlling decisions of this Court and inconsistent with congressional enactment of the Robinson-Patman Act as a separate conduct-governing provision. The panel's analysis of the price discrimination claim is also inconsistent with recent decisions of this Court warning against judicial attempts to repeal the Robinson-Patman Act.

Second, the way in which the panel applied its holding regarding cost-based proof of predatory intent is novel and inconsistent with decisions of other circuits. This holding involves an important question of interpretation of the federal antitrust laws which has not been, but should be, settled by this Court.

I.

THE PANEL'S HOLDING THAT THE PROOFS NECESSARY TO MAKE OUT A PRICE DISCRIMINATION CLAIM ARE IDENTICAL TO THOSE NECESSARY TO MAKE OUT A MONOPOLIZATION OR ATTEMPT TO MONOPOLIZE CLAIM IS IN CONFLICT WITH DECISIONS OF THIS COURT AND WITH ENACTMENT OF THE ROBINSON-PATMAN ACT AS A SEPARATE STATUTORY PROVISION

Both the district court and the panel accepted Gardner-Denver's argument that the proof of anti-competitive conduct necessary to make out a price discrimination claim under § 2(a) of the Robinson-Patman Act is "precisely the same as for predatory pricing under Section 2 of the Sherman Act." J. App. 799, A-30. This holding is in error. The proofs show that under the proper legal standard, Rogers was entitled to judgment on its § 2(a) claim.

A. Elements Of A Price Discrimination Claim

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, provides in pertinent part:

> It shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce . . . .

15 U.S.C. § 13(a). By its terms, the elements of a § 2(a) violation include (1) proof of discrimination in price, and (2) proof that such discrimination "may . . . substantially . . . lessen competition or tend to create a monopoly" in the relevant line of commerce. *See F.T.C.* v. *Morton Salt Co.*, 334 U.S. 37 (1948).

The courts have construed § 2(a) to proscribe two classes of price discrimination: "primary-line," in which the anticompetitive impact of the price discrimination falls upon a competitor of the seller, and "secondary-line," in which the impact falls upon a competitor of the purchaser. *See F.T.C.* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 542-45 (1960). The present case thus rests on primary-line price discrimination. While § 2(a) is frequently applied to primary-line geographic price discrimination, *see, e.g., Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. 685 (1967); *F.T.C.* v. *Anheuser-Busch, Inc., supra*; *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115 (1954), it is well-settled that purported "quantity discounts" constitute primary-line price discrimination[11] in violation of § 2(a) where there is a reasonable possibility of harm to competition and no statutory affirmative defense is proven.[12]

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[11] This Court in *Morton Salt*, a secondary-line case, applied § 2(a) to a purported "quantity discount." Both the courts and the Federal Trade Commission have applied the same analysis in primary-line cases. *See, e.g., Holleb & Co.* v. *Produce Terminal Cold Storage Co.*, 532 F.2d 29, 34-36 (7th Cir. 1975); *Forster Mfg. Co.* v. *F.T.C.*, 335 F.2d 47, 53-54 (1st Cir. 1963), *cert. denied*, 380 U.S. 906 (1965); *Dean Milk Co.*, 68 F.T.C. 710 (1965); *Jacobs Mfg. Co.*, 49 F.T.C. 1463 (1953) (consent order). *See generally* Sherwood, *Robinson-Patman Act Primary Line Injury: Meanderings from Porto Rico to Utah – And Beyond*, 16 U.C.L.A. L. Rev. 304, 360-74 (1969).

[12] The statutory "cost-justification" and "good-faith meeting competition" affirmative defenses, 15 U.S.C. §§ 13(a), 13(b), are not at issue in this appeal. Gardner-Denver has conceded that its blue list prices were not cost-justified (J. App. 705). Moreover, there is no evidence in the record and no finding by the district court regarding whether the price cuts were "made in good faith to meet an equal or lower price of a competitor." 15 U.S.C. § 13(b).

B. Proof Of Possible Anticompetitive Effect

Both the district court and the Sixth Circuit panel took "as given that in utilizing the blue list, Gardner-Denver satisfied the first requirement" of a price discrimination claim. 718 F.2d at 1439, A-13-14. The lower courts held, however, that in the absence of a general market study, the second element, proof of a possibility of anticompetitive effect, depends on proof of sales below average variable cost or marginal cost and that Rogers had failed to satisfy its burden of proof on this issue (J. App. 799, A-30; 718 F.2d at 1439-40, A-15-16). Rogers submits that the lower courts erred as a matter of law.

The case law demonstrates proof of the requisite "may . . . substantially . . . lessen competition" element may be established by proof of actual effect or by a general market analysis. Alternatively, because the statute requires only that there "may be" an anticompetitive effect, such effect may be inferred from proof of predatory intent. 16C J. Von Kalinowski, *Antitrust Laws and Trade Regulations*, ¶ 29.01[4] (1976). *Accord*, Sherwood, *Predatory Pricing*, *supra*, at 362. Predatory intent, in turn, either may be proven directly, *Lloyd A. Fry Roofing Co.* v. *F.T.C.*, 371 F.2d 277, 281-285 (7th Cir. 1967); *Forster Mfg. Co.* v. *F.T.C.*, *supra*, 335 F.2d 47, or may be inferred from evidence of predatory pricing. *F.T.C.* v. *Anheuser-Busch, Inc.*, *supra*, 363 U.S. 536; *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115 (1954).

The lower courts focused primarily on the second alternative for establishing the requisite possibility of anticompetitive effect, *i.e.*, proof of predatory pricing, and followed several decisions which have treated claims of primary line price discrimination as equivalent to § 2

claims.[13] Each of these decisions in turn relied on Areeda and Turner's comment that proof of possible effect under § 2(a) presents issues substantially similar to the proof of predatory intent under § 2 of the Sherman Act, and thus that predatory intent should be inferred only where the defendant prices below average variable or marginal cost. Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 891, 697 n.1 (1975), 724-28; 3 D. Areeda & D. Turner, *Antitrust Law*, ¶ 720 (1978). Rogers submits that this aspect of the Areeda and Turner hypothesis should be rejected.

The courts that have adopted this hypothesis have overlooked a substantial line of decisions by this Court which have upheld findings of price discrimination in violation of § 2(a) with no proof at all of defendant's costs. *See, e.g., F.T.C.* v. *Sun Oil Co.*, 371 U.S. 505 (1963); *Standard Oil Co.* v. *F.T.C.*, 340 U.S. 231 (1951); *Corn Products Refining Co.* v. *F.T.C.*, 324 U.S. 726 (1945). In *Utah Pie Co.* v. *Continental Baking Co.*, *supra*, 386 U.S. at 698, the only price discrimination case in which this Court even mentions costs, the Court reinstated a jury verdict for the plaintiff on its price discrimination claim where the defendant had priced "below cost," which the Court defined to be "less than . . . direct cost plus an allocation for overhead." This definition is that for average *total* cost, not marginal or average variable cost. The

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[13] *William Inglis & Son, Inc.* v. *ITT Continental Baking Co.*, 668 F.2d 1014, 1041 (9th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); *O. Hommel Co.* v. *Ferro Corp.*, 659 F.2d 340, 345-53 (3d Cir. 1981); *Janich Brothers, Inc.* v. *American Distilling Co.*, 570 F.2d 848 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978); *Pacific Engineering & Production Co.* v. *Kerr-McGee Corp.*, 551 F.2d 790, 798-99 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977); *International Air Indus., Inc.* v. *American Excelsior Co.*, 517 F.2d 714, 720-24 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976).

Areeda and Turner *per se* avarage variable or marginal cost test is inconsistent with the total cost standard suggested by this Court in *Utah Pie*, and with this Court's decisions in the *Sun Oil*, *Corn Products*, and *Standard Oil* cases where no proof of costs was required.

The lower courts' analysis is unsound for another reason. If applied to all § 2(a) claims, it would virtually eliminate any differences between predatory pricing claims under § 2 of the Sherman Act and price discrimination claims under § 2(a) of the Clayton Act. Section 2(a) recovery would be available only on facts which would also support § 2 recovery. This judicial conclusion would effectively repeal § 2(a) in many of its applications, defeating the congressional intent underlying the enactment of that section as a separate antitrust provision. Moreover, the statutory cost-justification defense would be eliminated, and the burden of proof transferred to the plaintiff; the only inquiry would be the relationship between the defendant's price and average variable or marginal cost.[14] These results are contrary to the intent of Congress embodied in the enactment of the Robinson-Patman Act, and encourage the very evils Congress sought to prohibit.

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[14] The mischief worked by equating § 2 and § 2(a) analysis is well illustrated by the district court's conclusion that Gardner-Denver's blue and white list revenues should be merged when determining whether revenue was below cost (J. App. 795, A-27). Existence of a price differential is an essential element of a § 2(a) offense, and the courts have held that a defendant may not satisfy the statutory cost-justification defense by averaging or cumulating sales to its various customers. *United States* v. *Borden Co.*, 370 U.S. 460 (1962); *Holleb & Co.* v. *Produce Terminal Cold Storage Co.*, 532 F.2d 29, 35 (7th Cir. 1975).

The critical issue can be simply stated: May the courts judicially repeal the Robinson-Patman Act based upon the view of academic commentators that the Act is unwise? Rogers submits that the answer to this question is clearly "No." The Robinson-Patman Act prohibition of price discrimination may or may not be wise; but at this time it remains the law of the land and may only be changed by congressional action. The courts which have attempted to rewrite the Robinson-Patman Act by replacing its operative provisions with Sherman Act standards have engaged in impermissible judicial legislation.

There can be no question that Congress enacted the Robinson-Patman Act in 1936 with the express intent of protecting small competitors against selective price cuts by larger competitors. See 1 American Bar Association Section of Antitrust Law Monograph No. 4, *The Robinson-Patman Act: Policy and Law* 5-19 (1980). The Antitrust Section also reviews various arguments for and against the continuation of the Robinson-Patman Act as a separate statute. *Id.* at 21-41. Indeed, in 1976, the Department of Justice drafted a proposed price discrimination act which, if enacted, would have repealed the Robinson-Patman Act and replaced it with a standard similar to that proposed by Professors Areeda and Turner. *Id.* at 90, 137; U.S. Department of Justice, *Report on the Robinson-Patman Act* 277 and App. C (1976). The fact remains, however, that no such proposed reform has been adopted by Congress. Unless and until Congress elects to repeal the Robinson-Patman Act or replace it with a different or lesser standard, the courts may not do so. The courts which have sought in effect to repeal the Robinson-Patman Act have acted beyond their jurisdiction.

Only last term, this Court acknowledged this debate, but twice emphasized that any changes in the Robinson-Patman Act must be made by Congress, not the courts:

> The Robinson-Patman Act has been widely criticized, both for its effects and for the policies that it seeks to promote. Although Congress is well aware of these criticisms, the Act has remained in effect for almost half a century. And it certainly is "not for [this Court] to indulge in the business of policy-making in the field of antitrust legislation. . . . Our function ends with the endeavor to ascertain from the words used, construed in the light of the relevant material, what was in fact the intent of Congress."

Jefferson County Pharmaceutical Assn. v. *Abbott Laboratories, Inc.*, _ U.S. _, _, 103 S.Ct. 1011, 1023, 74 L.Ed.2d 882, 898 (1983), *quoting United States* v. *Cooper Corp.*, 312 U.S. 600, 606 (1941). *Accord*, *Falls City Industries, Inc.* v. *Vanco Beverage, Inc.*, _ U.S. _, _, 103 S.Ct. 1282, 1289, 75 L.Ed.2d 174, 186-87 (1983).

The price discrimination worked by Gardner-Denver against Rogers in this case was most pernicious. Since the parties competed in all major markets in the country, selected geographic price cuts would not have been effective. Instead, Gardner-Denver accomplished the same effect by selling from its public white list to those customers who did not buy from or know about Rogers and utilizing its secret blue list with those customers who did. Gardner-Denver thus was able to depress all of Rogers' prices to an unprofitable level while keeping some of its prices at their former, very profitable level. It even was able to increase its white list prices during the existence of the blue list. This is precisely the type of unfair, anticompetitive behavior the Robinson-Patman Act was designed to prevent.

In addition and in the alternative, there is sufficient direct evidence in the present case of actual anticompetitive effect to entitle Rogers to prevail. The evidence in this case shows that Gardner-Denver's pricing behavior had the actual effect of depriving Rogers of sales, driving another small competitor from the market, and precluding entry into the market by a large potential competitor. There is also abundant evidence of Gardner-Denver's overwhelmingly dominant market position and substantial barriers to entry. See p. 5 & n.5, *supra*. The district court and the panel completely ignored evidence other than that of harm to Rogers alone. 718 F.2d at 1439, A-14-15. Rogers submits that this proof of anticompetitive effect was sufficient, as a matter of law, to support a price discrimination claim. Compare *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 561-62 (1981).

Striking in its similarity to the present case is the decision of the Seventh Circuit in *Holleb & Co.* v. *Produce Terminal Cold Storage Co.*, 532 F.2d 29, 34-36 (7th Cir. 1975), where the court inferred the existence of the necessary effect from the defendant's actions. In *Holleb*, the defendant offered identical frozen foods to various of its customers from three different catalogs, its "yellow, white and blue catalogs," as well as five undisclosed "price cells," 532 F.2d at 34. Unlike Gardner-Denver, however, the defendant in *Holleb* sought to justify these differentials as quantity discounts, 532 F.2d at 35. The plaintiff, a competitor of the defendant, alleged that sales at these differing prices constituted primary-line price discrimination in violation of § 2(a). The Seventh Circuit concluded that the purported cost justifications were insufficient, and that since the plaintiff and defendant "were competing for the same customers," the evidence presented a prima facie case of "reasonable probability of

injury" to primary-line competition between the plaintiff and defendant. 532 F.2d at 35. Applying the same analysis to the present case, Rogers' proofs on this issue are clearly sufficient to prevail.

Moreover, there is ample direct evidence that Gardner-Denver entertained predatory intent, including both the duration of and products affected by the price cuts, as well as memoranda and testimony regarding the defendant's actual intent to vanquish Rogers and other small competitors and preserve the markets for itself. The lower courts erroneously disregarded this direct evidence. As the Seventh Circuit concluded in *Lloyd A. Fry Roofing Co.* v. *F.T.C.*, 371 F.2d 277, 281 (7th Cir. 1967):

> In most primary line cases under this statute, a violation cannot be established without a close study of the market, including data as to the discriminator's share of the market. However, in cases of predatory intent, "injury to even a single competitor should bring this Act into play."

The direct evidence of predatory intent in this case, together with the other evidence of effect, requires the conclusion that there was a sufficient likelihood of anticompetitive impact to establish a price discrimination violation under § 2(a).

In summary, Rogers submits that the panel's holding that the proofs necessary to make out § 2 and § 2(a) claims are identical in effect repeals the prohibition of price discrimination contained in the Robinson-Patman Act. That section requires a plaintiff to prove only that "the effect of such discrimination *may be* substantially to lessen competition or tend to create a monopoly in any line of commerce" (emphasis added). Proof of *actual* anticompetitive effect is not required, in sharp contrast to the requirements for a monopolization claim under § 2 of

the Sherman Act. Moreover, the fact that the Robinson-Patman Act is a separate congressional enactment is a strong indication that the conduct proscribed by the Robinson-Patman Act is different from the conduct prohibited by the Sherman Act.

The decisions of the panel and the district court in this case, and similar decisions of several other circuits, are inconsistent with the decisions of this Court which hold that the requisite intent and possible effect on competition may be inferred in a price discrimination case from evidence of predatory pricing, but require no proof of defendants' costs for this purpose. The panel decision is likewise inconsistent with *Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. 695, 698 (1967), which suggests that proof of pricing below *total* costs may be relevant in a test. Finally, the panel decision is inconsistent with recent decisions of this Court warning against judicial efforts to repeal the Robinson-Patman Act. Grant of a writ of certiorari in this case is necessary to correct the lower courts' fundamental misinterpretation of this important piece of federal antitrust legislation.

II.

THE PANEL IMPROPERLY APPLIED A COST-BASED TEST IN REJECTING ROGERS' SECTION 2 CLAIMS

As the Sixth Circuit noted, proof of the defendant's intent is a necessary element of both a claim of monopolization and a claim of attempt to monopolize under § 2. A monopolization claim requires proof of general intent — that the defendant's acquisition or maintenance of monopoly power has been willful. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). An attempt claim requires proof of specific intent to monopolize. *Swift & Co.* v. *United States*, 196 U.S. 375,

396 (1905). The cases have always recognized that intent can be proven directly or by inference from the defendant's conduct; "predatory pricing" has merely been a means by which the courts have inferred from the defendant's activities the existence of the requisite intent. *See, e.g., United States* v. *American Tobacco Co.*, 221 U.S. 106, 182 (1911); *Standard Oil Co.* v. *United States*, 221 U.S. 1, 43 (1910); *Reynolds Metal Co.* v. *F.T.C.*, 309 F.2d 223 (D.C. Cir. 1962); *Atlas Bldg. Prod. Co.* v. *Diamond Block & Gravel Co.*, 269 F.2d 950 (10th Cir. 1959), *cert. denied*, 363 U.S. 843 (1960). Thus, while Rogers has characterized this case from the outset as one involving "predatory pricing" by Gardner-Denver, all direct and inferential evidence of Gardner-Denver's predatory intent is relevant to a determination of whether it entertained the requisite intent to commit a violation.[15]

In 1975, Professors Areeda and Turner advocated a rigid rule that an antitrust defendant's prices be considered *per se* lawful unless proven to be below its marginal costs or their surrogate in most circumstances, average variable costs.[16] Panels of the Fifth, Eighth, Ninth and Tenth Circuits have expressed approval of variations of the Areeda and Turner test. Each, however, has declined to adopt a strict *per se* approach, instead leaving open the possibility of proving intent by means other than proof of

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[15] In *MCI Communications Corp.* v. *AT&T*, 708 F.2d 1081, 1112 (7th Cir.), *cert. denied*, ___ U.S. ___, 104 S.Ct. 234, 78 L.Ed.2d 226 (1983), however, the court questioned whether direct evidence of subjective intent is meaningful in such cases.

[16] Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697 (1975); 3 D. Areeda & D. Turner, *Antitrust Law*, ¶ 711-722 (1978); Areeda & Turner, *Williamson On Predatory Pricing*, 87 Yale L.J. 1357 (1978); Areeda & Turner, *Scherer on Predatory Pricing: A Reply*, 89 Harv. L. Rev. 891 (1976).

pricing below marginal or average variable cost.[17] More recently, several courts have declined to adopt any specific cost-based test, while observing that some proof of defendant's costs was "relevant" and "useful" in determining whether defendant's intent or conduct was predatory.[18] Others have suggested they would adopt a non-*per se* marginal or average variable cost test, while finding it unnecessary to do so.[19]

The *per se* rule proposed by Areeda and Turner has been strongly criticized by academic commentators, the Department of Justice, and a presidential advisory

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[17] *Superturf, Inc.* v. *Monsanto Co.*, 660 F.2d 1275, 1281 (8th Cir. 1981); *California Computer Prods., Inc.* v. *International Business Machines Corp.*, 613 F.2d 727, 743 (9th Cir. 1979); *Pacific Engineering & Production Co.* v. *Kerr-McGee Corp.*, 551 F.2d 790 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977); *Janich Bros., Inc.* v. *American Distilling Co.*, 570 F.2d 848 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978); *Hanson* v. *Shell Oil Co.*, 541 F.2d 1352 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977); *International Air Indus., Inc.* v. *American Excelsior Co.*, 517 F.2d 714 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976) (adopting a similar analysis in a price discrimination context). Compare *Northeastern Tel. Co.* v. *AT&T*, 651 F.2d 76 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982), stating that prices above marginal or average variable cost would be presumed non-predatory, but not indicating whether this presumption was rebuttable. Also see *National Assn. of Regulatory Utility Commrs.* v. *FCC*, 525 F.2d 630, 637-38 & n.34 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976).

[18] *Chillicothe Sand & Gravel Co.* v. *Martin Marietta Corp.*, 615 F.2d 427, 530-32 (7th Cir. 1980). *Accord*, *Broadway Delivery Corp.* v. *United Parcel Serv.*, 651 F.2d 122, at 131 & n. 4 (2d Cir.), *cert. denied*, 454 U.S. 968 (1981).

[19] *MCI Communications Corp.* v. *AT&T*, 708 F.2d 1081, 1119-23 (7th Cir. 1983), *cert. denied*, __ U.S. __, 104 S.Ct. 234, 78 L.Ed.2d 226 (1983); *Richter Concrete Corp.* v. *Hilltop Concrete Corp.*, 691 F.2d 818, 824 (6th Cir. 1982); *Borden, Inc.* v. *F.T.C.*, 674 F.2d 498, 515 (6th Cir. 1982), *vacated on other grds.*, __ U.S. __, 103 S.Ct. 2115, 77 L.Ed.2d 1298 (1983); *Malcolm* v. *Marathon Oil Co.*, 642 F.2d 845, 853-54 & n.17 (5th Cir.), *cert. denied*, 454 U.S. 1125 (1981).

commission.[20] Indeed, Areeda and Turner themselves have expressed concern about the possibility that their rule might result in the exclusion of direct evidence of intent.[21]

Ignoring this scholarly and judicial criticism, the district court in this case at Gardner-Denver's urging unqualifiedly adopted Areeda and Turner's view that prices above defendant's average variable or marginal costs should be considered lawful *per se* (J. App. 795-96, A-27-28). The Sixth Circuit, however, rejected this rigid test and instead approved a "hybrid" test recently adopted by the Ninth Circuit:

> [W]e hold that to establish predatory pricing a plaintiff must prove that the anticipated benefits of defendant's price depended on its tendency to discipline or eliminate competition and thereby enhance the firm's long-term ability to reap the benefits of monopoly power. If the defendant's prices were below average total cost but above average variable cost, the plaintiff bears the burden of showing defendant's pricing was predatory. If,

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[20] Ewing, *Pricing Practices – Department of Justice Views*, (CCH) Trade Reg. Rep. ¶ 50,417 at 55,935-937 (1980); National Commission for the Review of Antitrust Laws and Procedures, *Report to the President and the Attorney General* 150 (1979); R. Posner, *Antitrust Law: An Economic Perspective*, 184-96 (1976); Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 Harv.L.Rev. 869 (1976); Scherer, *Some Last Words on Predatory Pricing*, 89 Harv.L.Rev. 901 (1976); Williamson, *A Preliminary Response*, 87 Yale L.J. 1358 (1978); Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 Yale L.J. 284 (1977). Also see Cooper, *Attempts and Monopolization, A Mildly Prophylactic Answer to the Riddle of Section Two*, 72 Mich. L. Rev. 373 (1974).

[21] *Ewing, supra*, at 55,936. Compare Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 Harv.L.Rev. 1313 (1978).

> however, the plaintiff proves that the defendant's prices were below average variable cost, the plaintiff has established a prima facie case of predatory pricing and the burden shifts to the defendant to prove that the prices were justified without regard to any anticipated destructive effect they might have on competitors.

718 F.2d at 1436, A-9, *quoting William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014, 1035-36 (9th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982).[22]

However, even though the district court clearly did not apply an analysis of this type, the panel nevertheless affirmed the district court's dismissal of Rogers' § 2 claims. In doing so, the Sixth Circuit itself failed properly to apply the "hybrid" test, and its result is therefore inconsistent with *Inglis* as well as with the Sixth Circuit's own purported rationale.

The thrust of the recent cases is to permit competitive price reductions where the market conditions are such that the reduction can reasonably be expected to minimize losses by expanding output and to prohibit them where the firm is accepting temporary unnecessary losses to discipline a competitor:

> [C]ost categories are solely for the purpose of providing aid in answering the ultimate question:

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[22] In *Transamerica Computer Co.* v. *IBM Corp.*, 698 F.2d 1377 (9th Cir.), *cert. denied*, ___ U.S. ___, 104 S.Ct. 1370, 78 L.Ed.2d 329 (1983), the Ninth Circuit explained its holding in *Inglis*, holding that prices above average total cost could be predatory on clear and convincing evidence. 698 F.2d at 1388. However, in *Arthur S. Langenderfer, Inc.* v. *S. E. Johnson Co.*, 1984-1 Trade Cas. (CCH) ¶ 65,905 (6th Cir. 1984), and *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227, 230-36 (1st Cir. 1983), the Sixth and First Circuits held that prices above average total cost were *per se* lawful, rejecting the *Transamerica* extension of *Inglis*.

> Did the justification for the defendant's price depend upon its anticipated destructive effect on competition or was the price justified as a reasonably calculated means of maximizing profits, minimizing losses, or achieving some other legitimate end?

Inglis, 668 F.2d at 1038. *Inglis* thus suggests that even where defendant's prices exceed its average variable costs, direct proof of the defendant's intent to engage in pricing or other conduct, "the anticipated benefit of [which] depended on their anticipated destructive effect upon competition and the consequent enhanced market position of the defendant," would bring any conduct by defendant in furtherance of these ends within the proscriptions of § 2.

In *Inglis*, the Ninth Circuit held that the direct evidence of defendant Continental's intent was "inconclusive." This evidence included a suggestion in a report prepared by its consultants recommending various alternative business strategies, including to "maintain price to hasten wholesaler exit pace." The court found, however, that "there is no direct evidence in the record that any further action was taken on this proposal or that Continental ever considered or adopted it as a course of action." 652 F.2d at 943. The court further observed that "[r]easonably interpreted, [the proposal] amounts to no more than a recommendation of the intensified price competition." *Id.*

In the present case, in contrast, there was no evidence that Gardner-Denver was trying to minimize losses and there was abundant evidence that it was attempting to damage Rogers and other small competitors and deter entry by others. Gardner-Denver's internal worksheet prepared prior to implementing the blue list reflects its calculations of the losses in revenue it expected from its actions without reflecting any offsetting gains in volume

(Exhibit 58; J. App. 404-08). Gardner-Denver did not determine its own costs, and had no accounting system in place which would have permitted such a determination (J. App. 295-97, 368, 377-78). It thus knowingly endured short-run losses with no business justification except the prospect of eliminating actual and potential competitors. The proofs show that Gardner-Denver's pricing actions were intended to "discipline or eliminate competition and thereby enhance the firm's long-term ability to reap the benefits of monopoly power." *Inglis*, 652 F.2d at 940. Under the proper standard, therefore, Gardner-Denver entertained predatory intent which brings its actions within the prohibitions of § 2. The panel, by deferring to findings of "fact" made by the district court under an erroneous legal test, erred as a matter of law.

The district court and Court of Appeals in this case also committed an error of law by misconstruing Rogers' expert's testimony regarding Gardner-Denver's costs. The uncontroverted evidence showed that Gardner-Denver's blue list prices were substantially below its average variable costs as defined by Areeda and Turner and the courts adopting variants of their rationale.

In his report and testimony, Mr. Parks concluded that based on his "accountant's" definition of variable and fixed costs, Gardner-Denver's blue list prices were on average below its average variable costs. Mr. Parks testified on cross-examination that based on his "accountant's" definition, he could not state with "specific confidence" that the blue list prices were at *all* times below Gardner-Denver's average variable costs. However, Mr. Parks further concluded in the same report and testified that employing the more inclusive variable cost definition of Professors Areeda and Turner, about half of what he considered to be fixed costs would be variable, and Gardner-Denver's blue list prices were substantially

below its average variable costs throughout the period the blue list was in effect. Mr. Parks' testimony based on the Areeda and Turner definition was clear, unequivocal and uncontroverted (Exhibit 149; J. App. 306-07, 313-14, 386-89, 792-93).

The opinion of the district court contains no reference to Mr. Parks' conclusions based on the Areeda and Turner definition. The Court of Appeals' panel inexplicably waves this evidence away, instead basing its holding solely on Parks' qualified conclusions premised on a less inclusive variable cost definition. 718 F.2d at 1437, A-10-11. The panel fails to explain why even the testimony on which it relied was not legally sufficient. No court has heretofore imposed the nearly insurmountable burden that each and every sale of thousands of individual parts over a six year period by the defendant must conclusively be proven below average variable cost. Parks' testimony that Gardner-Denver's sales on average were below that cost measure should have been sufficient to trigger a presumption of illegality.

Moreover, Mr. Parks' uncontroverted conclusion based on Areeda and Turner's definition of variable costs is crucial, since all the courts which have adopted some variant of an average variable cost test have done so based on the Areeda and Turner analysis. Areeda and Turner premised their rule that prices above average variable costs are *per se* lawful on a broad "economist's" definition of variable costs. If a more restrictive definition of variable costs is employed, the Areeda and Turner test would legitimize virtually any price reduction. Compare 3 D. Areeda and D. Turner, *supra*, ¶ 715c at 172-74. This is particularly so where, as here, the defendant is well-established and heavily capitalized, and therefore has a high proportion of fixed costs.

The panel ultimately concluded that Parks' "accountant's" definition of costs testimony was an

accurate reflection of "the financial information available to Gardner-Denver at the time it made its pricing decisions," and thus showed no predatory intent. 718 F.2d at 1437-38, A-11. This conclusion misses the point and is completely without support in the record. Parks testified without contradiction that based on his review of Gardner-Denver's records, Gardner-Denver had not at any relevant time attempted to determine the costs or profitability of its ratchet wrench product line; indeed, it was aware that its internal accounting system was seriously flawed (J. App. 295-97, 368, 377-78). Gardner-Denver's former sales manager readily admitted that the company made no effort to justify its blue list cost reduction or selection of the number five for the volume discount in terms of cost economies (J. App. 705). The only calculation Gardner-Denver actually made before adopting the blue list was of its expected revenue losses, without reflecting any expectation of offsetting gains in volume (Exhibit 58; J. App. 401-08). In view of this uncontroverted evidence, it makes no sense to consider an alternative conclusion in Mr. Parks' after-the-fact cost study a reflection of Gardner-Denver's good intent. The situation is completely unlike those where the courts have deferred to the defendant's actual good faith cost calculations made before a price reduction. See *California Computer Prods., Inc.* v. *IBM Corp.*, 613 F.2d 727, 740-41 n.19 (9th Cir. 1979); *In re IBM Peripheral EDP Devices Antitrust Litigation*, 481 F.Supp. 965, 997-1002 (N.D. Cal. 1979), *aff'd sub. nom. Transamerica Computer Co.* v. *IBM Corp.*, 698 F.2d 1377 (9th Cir.), *cert. denied*, __ U.S. __, 104 S.Ct. 370, 78 L.Ed.2d 329 (1983).

In sum, Rogers submits that the panel erred by misapplying the "hybrid" test which it claimed to adopt. By utilizing an improper definition of variable costs, the panel drastically lowered the level to which prices can be reduced without being presumed unlawful. Moreover,

while purporting to reject the discredited rule that prices above average variable cost are lawful *per se*, the panel in effect refused to credit strong direct evidence of predatory intent. The panel's conclusions would legitimize virtually any price reduction by a well-entrenched monopolist, allowing such monopolists to vanquish even more efficient but less well-capitalized rivals at will by selective deep price cuts. By these twin errors, the panel in effect adopts a *per se* rule more pernicious than the one it purports to reject. The facts of this case compel the conclusion that Gardner-Denver was knowingly attempting to discipline and exclude a rival, not make a profit. The decision below ignores that common-sense conclusion and, by transmuting a controversial economic standard never adopted by this Court, imposes an impossible burden of proof on any plaintiff in a § 2 case. It is hard to imagine any § 2 case which would meet the burden set below. Surely, neither Congress nor this Court intended for the Sherman Act to be so eviscerated.

The issues raised in this case have been the subject of numerous but inconsistent Court of Appeals decisions, and involve important questions of federal law which have not been, but should be, settled by this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: April 13, 1984

APPENDIX

OPINION

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 81-1314

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

D. E. ROGERS ASSOCIATES, INC., a Michigan corporation; and MICHIGAN SPECIALTIES MANUFACTURING COMPANY, a Michigan corporation,
Plaintiffs-Appellants,

v.

GARDNER-DENVER COMPANY,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed October 21, 1983

Before: MARTIN, Circuit Judge; BROWN, Senior Circuit Judge; and NEESE, Senior District Judge.*

BOYCE F. MARTIN, JR., Circuit Judge. In this private antitrust suit brought by D. E. Rogers Associates, Inc. seeking treble damages from Gardner-Denver Co., Rogers claims Gardner-Denver violated section 2 of the Sherman Act, 15 U.S.C. § 2, and section 2(a) of the Clayton Act, as amended

* Honorable C. G. Neese, Senior District Judge, United States District Court for the Middle District of Tennessee, sitting by designation.

by the Robinson-Patman Act, 15 U.S.C. § 13(a) when it reduced its prices for ratchet wrench parts sold in quantities of five or more to or below prices offered by Rogers for similar products. In a trial to the court without a jury, the district court dismissed the case following presentation of Rogers' evidence. We affirm.

Gardner-Denver, producers and marketers of a broad range of industrial tools, is the largest manufacturer of ratchet wrenches and their replacement parts in the United States. A ratchet wrench is a hand-held tool which uses pneumatic power to "set" or tighten mechanical nuts onto bolts or studs. It consists of a motor plus an attachment. It is most commonly used in the industrial mass-production of products such as automobiles and aircraft.

Until 1955, Keller Tool Company, the sole patent holder, monopolized the manufacture of ratchet wrenches. When the patent expired in 1955, Keller was acquired by Gardner-Denver and became the latter's Pneutronics Division. It continued to manufacture and market the wrenches and parts.

In 1964, Donald Rogers, a former Gardner-Denver employee, formed D. E. Rogers, Inc. and in conjunction with Michigan Specialties Manufacturing Company, a related concern, began selling ratchet wrench parts. Michigan Specialties manufactures many of the products sold by Rogers, although in some cases it relies on parts manufactured by others and in other cases it "jobs out" part of the manufacturing process to other manufacturers. Recently, Rogers has begun marketing a complete ratchet wrench tool.

From 1964 until late in 1971, Rogers and Gardner-Denver competed amicably in the ratchet wrench parts market. Throughout this period, Rogers was able to set its prices approximately thirty percent below Gardner-Denver's prices for the same or similar products. As testimony to its success, Rogers saw its gross sales grow from approximately $26,000 in 1964 to $300,670 in fiscal 1970.

On August 23, 1971, Gardner-Denver initiated a dual pric-

ing system for ratchet wrench parts and components. Pivotal to the system was the "blue list." The blue list contained parts which, if purchased in quantities of five or more, were available for substantially less than standard "white list" prices. The parts listed were, with a few exceptions, those parts also sold by Rogers. Blue list prices initially averaged sixty-four percent of white list prices and approximately nine percent below Rogers' then current prices for the same items. The blue list was distributed only to Gardner-Denver sales employees.

On September 29, 1971, Rogers responded to the blue list with its own revised price list. Rogers new prices were set approximately twenty percent below Gardner-Denver's blue list prices. These relative prices existed for five months until, on February 28, 1972, Gardner-Denver reduced its blue list prices further. The new prices were either equal to or, in some cases, less than Rogers'. Simultaneously, Gardner-Denver increased its standard, white list prices about nine percent. Two weeks later, on March 15, Rogers further reduced its prices where necessary to match Gardner-Denver's blue list prices. It also introduced a two percent cash discount. Approximately twenty-five months later, on May 1, 1974, Gardner-Denver increased its blue list prices five percent. On September 28, 1976, use of the blue list was discontinued.

It is unclear from the record the precise manner in which Gardner-Denver utilized its blue list. It is certain that not every purchaser of five or more of the blue-listed parts received the blue list discount; nor were purchasers of less than five parts consistently billed at white list rates. Rogers' expert testified that an analysis of Gardner-Denver's sales invoices for 1975 showed white list prices charged in twenty-four percent of all purchases of five parts or more and blue list prices charged in twenty-two percent of all sales of less than five parts.

It is Rogers' position that the blue list was specifically de-

signed to eliminate competition in the ratchet wrench parts market. According to Rogers, Gardner-Denver's blue list was below-cost pricing financed by company profits in other product areas. Financial resources derived from its diversified interests permitted this flexibility. By dropping its prices so precipitously, Rogers continues, Gardner-Denver hoped to drive its smaller, financially weaker competitors out of the market. As a result of the blue list, Rogers asserts, it lost profits and sales, was prevented from expanding its product line, and was, therefore, foreclosed from operating as a competitive force in the market.

The district court based its decision to dismiss the case on several factors. First, it found that Rogers had failed to prove Gardner-Denver's monopoly power in the relevant market. The relevant market, as held by the court, was not limited to ratchet wrench replacement parts but, rather, included mechanical "nutsetters" of all kinds. Although there was no evidence introduced as to market share in a market so defined, the court estimated that Gardner-Denver's share was from ten to fifteen percent. Citing the ease with which Rogers itself entered the market, the court further concluded that there existed no barriers to entry.

In addition the court held that Rogers had failed to prove that whatever sales and profit losses were incurred during the time Gardner-Denver's dual price list was in effect were the result of Gardner-Denver's actions. Rather, the court held, there were many other factors such as internal and organizational difficulties, other competitors, and quality control and distribution problems plaguing Rogers at the time which could easily have caused its losses. Next, the court found insufficient evidence of a direct or indirect nature of predatory intent on Gardner-Denver's part to support Rogers' allegations. The court employed a cost-based analysis for proof of intent by which Rogers was required to demonstrate Gardner-Denver's prices were below its average variable cost. This, the court found, Rogers was unable to do. Moreover, con-

tinued the court, it was a close question as to whether Gardner-Denver's prices were below average total cost.

Finally, the court held that the analysis in primary line price discrimination cases under section 2(a) of the Robinson-Patman Act is in all significant respects equivalent to the analysis undertaken in section 2 Sherman Act claims. Having found no proof of predatory pricing for Sherman Act purposes, the court held that Rogers had failed to prove the requisite anti-competitive effect for the Robinson-Patman Act claims.

The district court dismissed the case pursuant to Federal Rule of Civil Procedure 41(b). As this operates as an adjudication upon the merits, it is subject to the clearly erroneous standard of review. *Simpson* v. *United States*, 454 F.2d 691, 692 (6th Cir. 1972), *Man* v. *Rife*, 503 F.2d 735, 740 (6th Cir. 1974). That standard in a case such as this requires us to affirm the findings of the district court unless, after viewing all the evidence, we are left with "the definite and firm conviction that a mistake has been made." *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). "It is not enough . . . that we might give the facts another construction, resolve the ambiguities differently, and reach a conclusion different from that of the district judge. Such a conclusion on our part does not make the finding "clearly erroneous." *Strickler* v. *Pfister Associated Growers, Inc.*, 319 F.2d 788, 790 (6th Cir. 1963). Rather, Rogers must persuade us that no plausible view of the evidence would support the court's findings. This he has failed to do because of his inability to prove either directly or indirectly by a preponderance of the evidence that Gardner-Denver was engaged in predatory pricing. We find insufficient evidence of either a subjective or an objective, cost-based nature that Gardner-Denver's dual-pricing strategy was designed to discipline or eliminate competition. Because of this we need not reach the otherwise important issues of relevant market and causation, both of which were considered and disposed of below.

To prove Gardner-Denver attempted to monopolize the ratchet wrench parts market, Rogers must prove that Gardner-Denver "engaged in anticompetitive conduct with the specific intent to monopolize and that the attempt had a dangerous probability of success." *Richter Concrete Corp.* v. *Hilltop Concrete Corp.*, 691 F.2d 818, 823 (6th Cir. 1982) *quoting United States* v. *Dairymen, Inc.*, 660 F.2d 192, 194 (6th Cir. 1981). *Accord William Inglis* v. *ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981), *cert. denied,* 103 S.Ct. 57 (1982); *Northeastern Telephone Co.* v. *American Telephone & Telegraph Co.*, 651 F.2d 76 (2d Cir. 1981), *cert. denied,* 455 U.S. 943 (198–). As the Ninth Circuit in *Inglis* has carefully explained, the relationship between act and intent in attempted monopolization claims is a close one. On the one hand, direct evidence of specific intent to monopolize, without corresponding evidence of some act taken to achieve the goal, will never establish an antitrust violation. *Inglis,* 668 F.2d at 1028, n.7. On the other, evidence of anticompetitive conduct may be used to support a finding of intent where direct evidence of intent is unavailable. *Id.* at 1030. In this case, the district court found "no proof in the record of an intent to monopolize." The record supports that finding.

In a review of the record for direct evidence of specific intent to monopolize, we find actions which are at best ambiguous in their implications. Rogers points to Gardner-Denver correspondence referring to the plaintiff as a "pirate" manufacturer. However, other evidence, including testimony from Mr. Rogers himself, established that the term would be and was often used to refer to companies, like Rogers, which manufactured replacement or substitutes for equipment originally manufactured by another firm. Though the term could be used in a belligerent sense, it might as easily be employed in a neutral context to, we think, accurately describe a given manufacturing concern. That the district court concluded that it was used in this latter context in this case is not clearly erroneous.

Nor does the fact that Gardner-Denver's price cuts were directed at Rogers or other competitors conclusively prove anticompetitive intent.

> It is not anticompetitive for a company to reduce prices to meet lower prices already being charged by competitors. Indeed, "[t]o force a company to maintain non-competitive prices would be to turn the antitrust laws on their head. *ILC Peripherals* v. *International Business Machines Corp.*, 458 F.Supp. 423, 433 (N.D.Cal. 1978), *aff'd sub nom. Memorex* v. *International Business Machines Corp.*, 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 452 U.S. 972, 101 S.Ct. 3126, 69 L.Ed.2d 983 (1981).

Richter Concrete, 691 F.2d at 826. As Judge Kennedy stated in her dissent in *Borden* v. *FTC*, 674 F.2d 498, 519 (6th Cir. 1982). "[i]t is simply good business practice, not a use of monopoly power, to lower prices only where the competition is stiff." "[Desire] to win the competitive struggle . . . without more, is not unlawful." *Northeastern Telephone*, 651 F.2d at 76.

Without direct evidence of intent, it fell to Rogers to prove by inference from anticompetitive conduct the requisite intent necessary to support a violation. In fact, Rogers' Sherman and Robinson-Patman Act claims rely entirely on what Rogers claims was predatory pricing by Gardner-Denver. It alleges that Gardner-Denver's blue list was an attempt to drive the prices of its smaller, financially weaker competitor low enough to ruin it, whereupon Gardner-Denver would raise its prices and recoup its losses. We agree with the district court that Rogers failed to prove that Gardner-Denver's pricing policy was predatory.

In *Richter Concrete*, predatory pricing was defined as follows:

> Pricing is predatory when a company foregoes short-term profits in order to develop a market position such

> that the company can later raise prices and recoup profits. *William Inglis & Sons Banking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014, 1031 (9th Cir. 1981). Predatory pricing differs from healthy competitive pricing in its *motive*: "a predator by his pricing practices seeks 'to impose losses on other firms, not garner gains for itself.'" *Malcolm* v. *Marathon Oil Co.*, 642 F.2d 845, 853-54 (5th Cir.), *cert. denied*, 454 U.S. 1125, 102 S.Ct. 975, 71 L.Ed.2d 113 (1981) (footnote omitted). Price reductions that constitute a legitimate, competitive response to market conditions are not predatory. *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014, 1031-32 (9th Cir. 1981).

Id. at 823 (emphasis added). Motive being the distinguishing characteristic of predatory pricing, the courts and others have developed various methods of ascertaining motive when, as here, direct evidence is inadequate or unavailable. *Id.* Foremost amongst these methods is an objective cost-based test first advocated by Professors Areeda and Turner. *See* Areeda & Turner, *Predatory Pricing & Related Practices Under the Section 2 of the Sherman Act,* 88 Harv. L. Rev. 697 (1975). Generally speaking, the Areeda/Turner test relies on the relationship between a product's marginal cost and its price to determine whether or not the firm which sells the product is engaged in anti competitive behavior. Because of the difficulty inherent in accurately determining marginal cost, the Areeda/Turner test uses average variable cost as a surrogate. Areeda & Turner, *supra*, at 717. Pricing at or above marginal or average variable cost, they argue, should be conclusively presumed acceptable while pricing below that level conclusively presumed illegal or predatory. *Id.* at 711. *See Inglis*, 688 F.2d at 1032.

This standard has not been adopted unqualifiedly. *See Richter Concrete*, 691 F.2d at 823; *Inglis*, 668 F.2d at 1032. Although the courts have accepted the marginal or average variable cost standard as an indicator of intent, many allow

for consideration of other factors indicative of predation. A leading example of this hybrid approach is that taken by the Ninth Circuit in *Inglis*. There the position was taken that although average variable cost is a generally reliable indicator, there are market situations where a rational firm would find it prudent to sell below its average variable cost. *See id.* at 1035, n.32. Conversely, it acknowledges that in certain situations, a firm selling above average variable cost could be guilty of predation. *See id.* at 1035. Consequently, it focuses "on what a rational firm would have expected its prices to accomplish." *Id.* at 1034. Accordingly, it permits the introduction of any evidence, in addition to costprice figures, to illuminate the rationale behind the defendant's pricing policy.

> [W]e hold that to establish predator pricing a plaintiff must prove that the anticipated benefits of defendant's price depended on its tendency to discipline or eliminate competition and thereby enhance the firm's long-term ability to reap the benefits of monopoly power. If the defendant's prices were below average total cost but above average variable cost, the plaintiff bears the burden of showing defendant's pricing was predatory. If, however, the plaintiff proves that the defendant's prices were below average variable cost, the plaintiff has established a prima facie case of predatory pricing and the burden shifts to the defendant to prove that the prices were justified without regard to any anticipated destructive effect they might have on competitors.

Id. at 1035-36.. *Cf. Northeastern Telephone*, 651 F.2d at 88, *Superturf, Inc.* v. *Monsanto Co.*, 660 F.2d 1275, 1281 (8th Cir. 1981).

Although this circuit has not had an occasion to enunciate a specific cost-based test for predation, *see Richter Concrete*, 691 F.2d at 824, we feel that the Ninth Circuit's modified version of the Areeda/Turner test is appropriate. Applying that standard to the case before us, we agree with the district court's finding that Rogers failed to introduce sufficient evi-

dence of either a direct or indirect nature to prove that Gardner-Denver's motives in establishing the blue list were predatory.

To review the evidence, we first reiterate that the record lacks any conclusive or convincing direct evidence bearing on the issue of motive. Rogers' case is not helped, moreover, by a cost-base analysis. Parks, an accountant called as an expert witness by Rogers, testifying as to the extensive examination and analysis he undertook on Gardner-Denver's financial records, could state only that Gardner-Denver sold "in the vicinity of" average variable cost; that he could not say "with specific confidence" that they sold beneath average variable costs during the entire period. The district court accepted this testimony as proof that Gardner-Denver's prices during the period were not below average variable cost. Given the absence of any other evidence bearing on the issue, we do not think the court's conclusion clearly erroneous. It thus fell to Rogers to rebut through the introduction of additional evidence the presumption which arises from such a finding that the defendant was not predatorily pricing. *Inglis*, 668 F.2d at 1035-36. This, as we have already discussed, Rogers could not do.

Interestingly, Rogers argues against our acceptance of Parks' cost analysis. Specifically, it contends that Parks based his calculations of costprice relationships on his "accountant's" definition of variable and fixed costs. Those calculations yielded the conclusions discussed above. Rogers contends, however, that if we follow the Areeda/Turner test for predation, we must also adopt Areeda's and Turner's "economists'" definition of variable and fixed cost. Rogers then points to Parks' testimony that had he used this "more inclusive" definition of variable costs, Gardner-Denver's average variable costs would have significantly exceeded its price for ratchet wrench parts.

Despite Rogers' dire prediction that failure to employ the Areeda/Turner broad definition of variable cost would render

a plaintiff's task of satisfying the test well nigh impossible, we decline to require rigid categories of variable and fixed costs be applied in every predatory pricing case. Beyond the general statement that fixed costs are not affected by output while variable costs are, it is impossible to determine in advance and outside the specific factual context the variablity of any particular expense. *Inglis*, 668 F.2d at 1037. That type of fact specific, tailored inquiry into cost allocation by the defendant seller is crucial because, as the district court stated, costprice analysis is but a "surrogate" for intent. To determine anticompetitive intent with any degree of certainty or justification from objective examination of an alleged predator's pricing policy, one must be certain that the categorization of costs reflect the actual situation facing the seller. That will vary with the facts of each case. *Id.* at 1038.

Parks' general definitions of fixed and variable costs are in accord with those proposed by Areeda and Turner and adopted by us. Beyond these broad outlines, however, Parks used an "accountant's," as opposed to an "economist's" definitions to more precisely allocate expenses. As plaintiff's exhibit 149, a letter from Parks to Rogers' counsel, reflects, Parks' allocative process was indepth, detailed, and thorough and based upon all the financial information available to Gardner-Denver at the time it made its pricing decisions. Presumably this was precisely the task Rogers' counsel set for Parks, although it no doubt expected a different result. Be that as it may, we think the cost allocation method employed by Parks produced results which, insofar as they reflect a comprehensive analysis of the economic horizon facing Gardner-Denver at the time it instituted the blue list, produced a nearly accurate projection of the cost factors facing Gardner-Denver. Because the ascertainment of Gardner-Denver's intent is the signal goal of this deductive process, only those factors are important. Because Parks' results do not conclusively prove below average variable cost pricing, we find that the district court's determination that the defendant's motives were nonpredatory was correct.

Rogers' monopolization claim fails as well. To prove monopolization, Rogers was required to prove Gardner-Denver's (1) possession of monopoly power in the relevant market and (2) its willful acquisition or maintenance of that power as a consequence of a superior product, business acumen, or historic accident." *United States* v. *Grinnell,* 384 U.S. 563, 570-71 (1966). Assuming, contrary to the district court's finding but without deciding, that Gardner-Denver possessed monopoly power in the relevant market and that the power was lawfully acquired, Rogers, on the record before us, has failed to prove that Gardner-Denver willfully used its monopoly power to maintain its position.

Whether or not a monopolist has grown and developed as a consequence of willful acts directed at maintaining its monopoly or, in the alternative, as a consequence of a superior product, business acumen, or historic accident is not always an easy question to answer. It is made more difficult by the fact that the acts or practices upon which a monopolization claim may rest need not be in themselves illegal. *Borden,* 674 F.2d at 513; *California Comruter Products* v. *International Business Machines,* 613 F.2d 727, 735 (9th Cir. 1979). Nor is it necessary that in commission of those acts, a monopolist have had the specific intent to eliminate competition. *Id.; Dimmitt Agri Industries, Inc.* v. *CPC International, Inc.,* 679 F.2d 516, 531 (5th Cir. 1982), *cert. denied,* 51 U.S.L.W. 3756 (April 19, 1983). Nevertheless, not every act by a monopolist which has lawfully acquired its monopoly power violates section 2. *California Computer Products,* 613 F.2d at 736 n.7. "The otherwise lawful conduct forbidden by section 2 . . . is a monopolist's use of *monopoly* power in order to maintain or improve its position in the market." *Borden,* 674 F.2d at 518 (emphasis in original). *See United States* v. *Girffith,* 334 U.S. 100, 107 (1948); *Berkey Photo, Inc.* v. *Eastman Kodak Co.,* 603 F.2d 263, 274 (2d Cir. 1979), *cert. denied,* 444 U.S. 1093 (1980). Generally speaking, a monopolist uses its monopoly power in a manner prohibited by section 2 when it

acts "in an unreasonably exclusionary," *Byars*, 609 F.2d at 853, or "anticompetitive," *Borden*, 674 F.2d at 518, manner towards its rivals. *See California Computer Products*, 613 F.2d at 735 ("plaintiff must show that the defendant's acts 'unnecessarily excluded competition' from the relevant market").

In this case, our finding that Gardner-Denver did not engage in predatory pricing compels the conclusion that there was nothing unreasonably exclusionary or anticompetitive in Gardner-Denver's pricing activity. We reiterate that "it is not anticompetitive for a company to reduce prices to meet lower prices already being charged by competitors." *Richter Concrete*, 691 F.2d at 826. *Superturf*, 660 F.2d at 1281. As we found in our analysis of the claim of attempted monopolization, despite substantial price reductions, Gardner-Denver continued to price at or above marginal cost. Marginal cost pricing, the "socially optimal" level, Areeda & Turner, *supra* at 711, is consistent with competition on the merits, however. *California Computer Products*, 613 F.2d at 743. "Where the opportunity exists to increase or protect market share profitably by offering equivalent or superior performance at a lower price, even a virtual monopolist may do so." *Id.* at 742.

Our analysis brings us, finally, to Rogers' price discrimination claim under section 2(a) of the Robinson-Patman Act. The district court concluded that in this case, the legal analysis of a section 2(a) claim is equivalent to that of a section 2 claim under the Sherman Act. Having found no violation of the Sherman Act, the Court dismissed the section 2(a) claim. We agree.

To successfully prove price discrimination, Rogers was required to prove that (1) Gardner-Denver discriminated "in price between different purchasers of commodities of like grade and quality," and (2) the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce." 15 U.S.C. § 13(a). *See FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948). We take as

given that in utilizing the blue list, Gardner-Denver satisfied the first requirement. Our analysis here, therefore, focuses on the anticompetitive effect of the defendant's actions.

Rogers' complaint alleged primary line, non-geographic price discrimination. Where, as here, the plaintiff in a primary line case has not undertaken a general market analysis to prove anticompetitive effect, many of the courts to have recently considered Robinson-Patman Act claims look to evidence of predatory intent from which to infer injury to competition. *See, e.g., Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. 685, 696-98 (1967); *International Air Industries, Inc.* v. *American Excelsior Co.*, 517 F.2d 714, 722-23 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976); *Pacific Engineering & Production Co. of Nevada* v. *Kerr-McGee Corp.*, 551 F.2d 790, 798 (10th Cir. 1977), *cert. denied*, 434 U.S. 879 (1977); *Inglis*, 668 F.2d at 1040. These same courts, moreover, agree that the principles behind proof of predatory intent in Sherman Act claims are "equally applicable" to proof of predatory intent in a Robinson-Patman Act suit. *Inglis*, 668 F.2d at 1041 and cases cited therein. "Where a price differential threatens a primary line injury," said the Ninth Circuit, "section 2 of the Sherman Act . . . and section 2(a) of the Clayton Act . . . are directed at the same economic evil and have the same substantive content." *Janich Bros., Inc.* v. *American Distilling Co.*, 570 F.2d 848, 855 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978). *Accord, Pacific Engineering & Production*, 551 F.2d 798.

In this case, there is no evidence of anticompetitive effect, direct or inferential, in the record. Rogers claims that as a result of defendant's predatory actions, it lost business and profits, both of which, it further claims, directly evidenced the requisite effect on competition. We disagree. Without more, loss of business and profits is as likely the result of honest competition as it is the result of illegal conduct. As

the Fifth Circuit stated in *International Air Industries*, a case factually very similar to the case before this court,

> It is settled law that a mere diversion of business from one competitor to another does not signify detriment to competition on the seller level. . . . Mere loss of profits shows no more than that . . . [the plaintiff] . . . was forced to charge a competitive price because it faced competition. Similarly, the large size of the discriminator and even the fact that its sales increased during the period of discrimination would not necessarily make out a case. *Anheuser-Busch, Inc.* v. *FTC*, 289 F.2d 835, 839, 843 (7th Cir. 1961). It is possible for damage to a single competitor to meet the statutory requirements, *see Borden Co.* v. *FTC*, 381 F.2d 175 (5th Cir. 1967), but a showing of more than competitive pricing and a shift of customers is necessary. Evidence of certain types of predatory conduct, we feel, would fulfill the requirements.

517 F.2d at 721-22 (footnotes omitted).

What Rogers cannot prove directly it is equally unsuccessful proving inferentially. Accepting as we do the propositions that a Robinson-Patman Act plaintiff may prove anticompetitive effect inferentially from proof of a defendant's anticompetitive intent, and that proof of anticompetitive intent in section 2(a) cases is no different from its proof in Sherman Act cases, we agree with the district court that in this case Rogers' failure to prove anticompetitive intent directly, *supra* or indirectly through proof of pricing below average variable cost is fatal to its price discrimination claim.

Contrary to Rogers' arguments here, we do not think that equating the proof required to show a Sherman Act violation with that necessary to show a violation of the Robinson-Patman Act will immasculate the latter provision. Only in cases such as this, where the section 2(a) plaintiff is forced to rely on proof of predatory intent to show that the defendant's

discriminatory pricing did or might have harmed competition will the two provisions appear as one. Be that as it may, we are not prepared to punish under any guise conduct which we conclude was well within the competitive boundaries the antitrust laws were enacted to protect.

The decision of the district court dismissing all claims by Rogers against Gardner-Denver is affirmed.

JUDGMENT

(United States Court of Appeals
for the Sixth Circuit)

(Filed October 21, 1983)

(D. E. Rogers, Associates, Inc., et al., Plaintiffs-Appellants, v. Gardner-Denver Company, Defendant-Appellee — No. 81-1314)

Before: Martin, Circuit Judge; Brown, Senior Circuit Judge; and Neese, Senior District Judge.

On Appeal from the United States District Court for the Eastern District of Michigan.

This Cause came on to be heard on the record from the said District Court and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed.

It is further ordered that Defendant-Appellee recover from Plaintiffs-Appellants the costs on appeal, as itemized below, and that execution therefor issue out of said District Court, if necessary.

Entered By Order Of The Court,

/s/ John P. Hehman,
Clerk

Issued as Mandate: January 26, 1984
Costs: None

(*Certification Omitted*)

ORDER

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

(United States Court of Appeals
for the Sixth Circuit)

(Filed January 18, 1984)

(D. E. Rogers Associates, Inc., a Michigan corporation; and Michigan Specialties Manufacturing Company, a Michigan corporation; Plaintiffs-Appellants, v. Gardner-Denver Company, Defendant-Appellee — No. 81-1314)

Before: Martin, Circuit Judge; Brown, Senior Circuit Judge; and Neese, Senior District Judge.*

On receipt and consideration of a petition for rehearing and suggestion for rehearing en banc in the above styled case; and

No judge in active service in this Court having moved for rehearing en banc and the motion therefore having been referred to the panel which heard the case; and

The panel having noted nothing of substance in said motion for rehearing which had not been carefully considered before issuance of the Court's opinion,

Now, therefore, the motion for rehearing is hereby denied.

Entered By Order Of The Court

/s/ John P. Hehman,
Clerk

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* Honorable C. G. Neese, Senior District Judge, United States District Court for the Middle District of Tennessee, sitting by designation.

OPINION

(United States District Court —
Eastern District of Michigan —
Southern Division)

(D. E. Rogers Associates, Inc., a Michigan corporation, and Michigan Specialties, Inc. [*sic*], a Michigan corporation, Plaintiffs, v Gardner-Denver Co., a Delaware corporation, Defendant — No. 4-72222)

Proceedings had in the within-entitled matter before Honorable Horace W. Gilmore, United States District Judge, at Detroit, Michigan, commencing Thursday, March 19, 1981.

SESSION OF TUESDAY, MARCH 31, 1981

(771) Detroit, Michigan
Tuesday, March 31, 1981
10:30 o'clock A.M.

(The hearing of the cause resumed pursuant to the adjournment of March 30, 1981.)

The Court: Good morning.

Mr. Cutler: Good morning, your Honor.

Mr. Curtner: Good morning.

The Court: I apologize for being so late in getting started on this matter, however, I had a lot of work I wanted to do on the case and the tragic events of yesterday sort of slowed down the work.

This matter is before the Court upon defendant's motion for involuntary dismissal under Rule 41(b) which provides in significant part:

> "After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his

> right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them (772) and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence, If the court renders judgment on the merits against the plaintiff, the court shall make fiindings as provided in Rule 52(a)."

I want to first thank all counsel for the excellent job that they have done in this case. I think it has been very well presented and it's a real pleasure to work with such competent counsel as we have had here.

The case involved deals only with ratchet wrench replacement parts. We are not dealing with the whole tool. There is no claim here that at least survived pre-trial proceedings that the defendant manufactures the whole tool in any way that violates the antitrust law. The case is basically an antitrust and Robinson-Patmon [*sic*] Act case in three counts and it's basically a predatory pricing case.

Some of the facts I think need to be spelled out as we proceed into the disposition of this motion:

The plaintiff, Rogers, was for many years an employee of the defendant and in 1964 he opened (773) his own business and started to manufacture ratchet wrench replacement parts which were manufactured by the plaintiff from 1964 to 1971. The plaintiff sold his ratchet wrench parts at 70 percent of defendant's list price.

In August, 1971, the defendant came out with a second price list. Prior to that time it had one price list, the so-called, white list, but it came out with a "blue price list" in August of 1971, and the blue price list contained prices at 62 percent of white list prices and under the terms of the sales on the blue list a buyer could not envoke [*sic*] the blue list price unless he purchased five or more units.

In October of 1971, the plaintiff then lowered his prices below the defendant's blue list price. I think it's important to point out the chronology of the prices of the plaintiff and the blue list price of the defendant.

As I said the first blue list price in which the defendant cut prices below the plaintiff's prices came out in August of 1971. On October 15, 1971, the plaintiff dropped his price below the blue list price. On February 28, 1972, the defendant then dropped its prices again below the plaintiff's prices, and on March 15, 1972, the plaintiff then brought its price down to the same price as defendant.

(774) Shortly thereafter he offered a two percent cash discount with payment by the 25th of the month. So, from 1973 on the plaintiff was selling at the same price as the defendant but there was a two percent cash discount which plaintiff testified 98 percent of the people took.

In May, 1974, the defendant raised his prices five percent and the plaintiff retained the same price giving a differential between the parties' prices of seven percent, with the defendant being seven percent higher, and in July, 1975, the defendant again raised prices by four percent and the plaintiff remained the same, leaving a price differential total of 11 percent, if a two percent discount were applied.

Thus, the only time in the entire period we are concerned with when the defendant's blue list prices were below those of plaintiff was a period from August to October, 1971, and February 28, to March 15, 1972. In the rest of the period of time either they were the same or the defendant's prices were higher.

I think other preliminary facts we ought to consider are the facts that in 1970 and '71, and for several years off and on, the plaintiff experienced all kinds of problems in the business. First of all, his brother-in-law, Mr. Whitcroft, who had been in the (775) business with him, separated from the plaintiff's business, formed his own competing enterprise, Trans Penumatic, which produced ratchet

wrench replacement parts, and the brother-in-law took with him shortly thereafter Mr. Jessup, the plaintiff's principal sales person and other important personnel.

I need not detail in these findings all of the problems the plaintiff had but it's clear from the record and from the exhibits, that between 1970 and 1975, plaintiff had recurring problems with distributors, recurring problems with sales people and recurring problems with quality. The quality eventually was cleaned up but early on there was problems with quality of a product and this caused a great deal of problems for the plaintiff.

In looking at this entire matter we must look at several factors, the first of which is relevant market. Of course, a relevant market is defined in two ways: product market and geographical market. The question becomes what is the relevant product market as to ratchet wrench replacement tools?

In the cellophane case, U. S. v Dupont, 351 US 377, the court, speaking of relevant market said:

> (776) "We must include interchangeable products even though certain products are better suited for a particular purpose."

In this case the ratchet wrench, the replacement parts for which, and the attachments of which are the subject of this case, is a wrench that goes into a very narrow space in the manufacture of automobiles, airplanes and agricultural implements.

The testimony shows that the ratchet wrench is often unreliable. It breaks down easily and manufacturers are constantly trying to design away from the ratchet wrench. It does a very special job but I think there is no question but what other types of wrenches that have been talked about come within the relevant market.

First of all, there is no census definition for ratchet wrenches and I find that impact wrenches, right angle tools, Stanley ratchet wrenches, the crowfoots and mechanical nutsetters of all kinds come within the relevant product market. There are many other manufacturers including Chicago Pneumatic, Cleco, Ingersoll Rand and others.

So, I think it's clear that the relevant (777) product market here is not merely ratchet wrench replacement parts and ratchet wrench attachments, but the relevant market includes nutsetters of all kinds, including impact wrenches, right angle tools, Stanley ratchet wrenches, the crowfoots and other mechanical nutsetters. All of these products compete.

The testimony is clear that if the buyer could get a crowfoot, for example, instead of one of the defendant's ratchet wrenches, it would do so. As I said, it's significant there is no census classification for ratchet wrenches as an individual product.

So, I think when we look at the relevant market and look at the definition in the cellophane case, U. S. v Dupont, we have to find all of these items are in the relevant product market. That being so we must, of course, discount then the testimony of Mr. Sponsler, on whom the plaintiff relies.

Mr. Sponsler, and I'm not saying he is wrong and I'm not saying I don't believe him, but Mr. Sponsler testified that Gardner Denver had 70 to 80 percent of the ratchet wrench market. I don't dispute that figure because it's really the only figure in the record. However, when you look at the broader market as I defined it above, defendant's share of the relevant market is much, much less.

We don't have any evidence of what it (778) is but if you look at the relevant product market, its a relatively small percentage, certainly it does not approach 70 percent or 50 percent, certainly it's probably closer to 10 to 15 percent.

There is no testimony here other than that of Sponsler that defendant controls a monopoly share of the relevant market when the relevant product market is defined under U. S. v Dupont. Certainly, I think it's clear, the plaintiff has not proved that defendant dominated the relevant product market.

Another factor the Court must consider in determining whether there has been a prima facie case made out here is the whole area of ease of market entry. The earmark of monopolization is the difficulty with which a new producer or manufacturer can enter into the market. The fact that a new competitor can enter the market easily indicates that domination of the market does not exist.

In the present case it's absolutely clear from the testimony that the plaintiff got easily into the market. No special preparation was required. I believe the testimony was that he entered the ratchet wrench replacement parts market with an original investment of only $1400, and, so, I think it's clear that plaintiff made no showing whatever that the defendant had a dangerous probability of success of monopolizing the market and excluding the plaintiff.

(779) There is also, as pointed out, a serious causation problem. I fail to find proof that any of the losses were directly attributable to the defendant. There were so many other factors that exist that could cause any of the losses plaintiff had, such as product problems, additional competitors, internal sales problems, distribution problems, just to mention a few, that it's exceedinly difficult to find the necessary causation here.

Plaintiff claims one of the big problems was the fact it did not get its name on crib cards and, therefore, that there was monopolization brough about by the defendant's ability to stay on the crib cards. There is no evidence in this record whatever that the defendant has the slightest

control over crib cards. The crib cards were controlled by the individual manufacturers and so I think quite simply on this issue the plaintiff has not borne the burden of proof necessary to show that monopoly power was exercised by the defendant.

He failed to prove the defendant had the power to exclude the plaintiff from the relevant market, had the relevant market been defined, and although the plaintiff was not happy with the quotation of Mr. Cutler, I think his statement, and the statement from cases, that the purpose of the antitrust law is to protect competition not to protect the plaintiff from competition, is a very (780) significant statement and I think is a statement that applies closely, very closely and very aptly to the facts as developed in this case. That is basically what this case is all about.

Before I go on to make other findings, I think it's necessary that I say something about costs. I do not think a determination of whether we should use the average variable cost or average total cost is absolutely necessary to a determination of this motion but I think because there will undoubtedly be an appeal I should talk about my findings on cost and talk about the testimony of Mr. Edward Parks who, obviously, is a well-qualified, competent certified public accountant.

I start out by saying it's clear from the testimony of Mr. Parks that sales at the blue list were not below average variable cost. Mr. Parks testified on page 377 of the record as follows:

> "A My position and analysis has been that they sold at or below, using a sample like I did, using the estimates that I have made, given the kind of information taht we didn't have either. I cannot say with specific confidence that on my definition of variable and fixed

costs that they sold beneath (781) average variable costs during the entire period.

The Court: You cannot say that they sold below average variable costs?

A With certainty, that's correct. I can say they sold in the vicinity of it. Certainly my calculations show them selling below but the degree to which they are below is nominal and within the range of statisical variations that you get from a sample."

In other words, his testimony was absolutely clear that there is no evidence that the sales on the blue list were below average variable cost and his testimony never changed on that regard throughout the entire trial.

The Court, therefore, finds that the defendant at no time in this case sold ratchet wrench replacement parts or attachments below average variable cost. Moreover, I think there is a serious question whether plaintiff has proved that the defendant sold below average total cost.

In determining that they had, Mr. (782) Parks, and I do not criticize him, although I do not agree with him, ignored Gardner Denver's cost system they have been using for 30 years, where the burden had been allocated to individual products in proportion to direct labor dollars. Mr. Parks rejected this method, choosing instead to allocate the burden on the basis of sales price.

This after-the-fact reallocation of burden had the effect of substantially increasing the burden allocated to ratchet wrench parts and I feel that Mr. Parks' calculations there artificially increased the average total cost to an extent that they exceeded Gardner Denver's blue list price.

Thus, there is a serious question about whether plaintiff's proofs are such as would show costs below average total cost. In all events, plaintiff has not shown

predatory pricing using either average variable cost or average total coast. The variable costs are clearly below the blue price list and the average total costs were figured contrary to Gardner Denver's calculation of the last 30 years. Of course, we only look at costs, either average variable cost and average total costs, as a surrogate for intent.

So, clearly, even if you use the average total cost the fact that Gardner Denver had been using this, calculating the burden this way for 30 years, (783) shows the Court clearly that there is no, that this cannot be used as a factor to prove predatory intent to violate the antitrust law.

I also feel that Mr. Parks in his calculation restricted the figures to only blue list prices in figuring cost and I feel that in getting an accurate picture of costs it is also necessary, it would also have been necessary to use both blue list and white list revenues.

With respect to what standard should be applied, I hold the proper standard is average variable cost, contrary to Judge Cook, for whom I have the greatest respect, but I disagree with him and, as I indicated earlier in the trial, I do not feel that Judge Cook's determination became the law of the case. I think the case having been tried by me I have the right to make the determination as to the standard. I feel that the proper standard, correct standard, in determining cost is average variable cost.

These are defined as the sum of the costs avoided if production of a product in question is reduced to zero divided by the number of product produced.

I feel, and find, that the use of average variable cost is the proper economic method for a company with a multiproduct line. Such a method allows (784) that company to shift its costs from production of one product to another, minimizing drastic increases in cost. So, with a

company like Gardner Denver I feel that average variable cost rather than average total cost in the context of the antitrust case, should be the proper test.

Although this is an open question in the Sixth Circuit, there are cases in other circuits that enunciate the principle of average variable costs, including California Computer Products in 613 F.2d, 727, and Janich v The American Distilling Company, 570 F.2d, 484.

As I said, there are three counts in this case. The first count is the monopolization claim under Section 2 of the Sherman Act, 15 USC 2. To establish this claim there must be two elements established, the definition of relevant market and establishment of monopoly power in that market and the proof the defendant acquired monopoly power in the relevant market willfully and intentionally.

Based on the findings of fact I already made in this case, I hold there has been no such showing in the first place on the relevant market, as I defined it. There is no showing the defendant acquired monopoly power, and, secondly, there is no showing here of willful and intentional obtaining a monopoly power by the proofs (785) here and, of course, the discussion of costs goes to that.

Costs, as Mr. Curtner argues, are just a surrogate for intent. Further, I find no proof in this record of an intent to monopolize as require by U. S. v Grinnell, 384 U. S. 563.

The second count is a claim of intent to monopolize and requires four elements: Market power within the relevant market, although less than necessary for a monopolization claim, a specific intent to monopolize acts toward that end and a dangerous probability of success in the relevant market.

It appears clear in this case, and I have already found that there is no specifc intent to monopolize. I found that there have been no acts taken to that end because I can see what it has done here is normal competition and,

obviously, there is no dangerous probability of success in the relevant market and, therefore, there is no basis for Count Two; a failure of proof on Count Two.

As to Count Three, it's brought under Section 2(a) of the Clayton Act, 15 USC 13(a) which states in pertinent part:

> "It shall be unlawful for any person engaged in commerce to discriminate in price between different purchasers of (786) commodities of like grade and quality where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce."

There are two elements of primary line discrimination and that is what we are talking about here. First, that the defendant did in fact engage in price discrimination, that is, that defendant made at least two reasonably contemporaneous sales of the same product to two different purchasers at two different prices and that the price discrimination had the requisite anticompetitive effect.

It's essential for proof of price discrimination in this count for the plaintiff to prove that the defendant acted in an anticompetitive way. In the past practically all primary line discrimination cases have been premised upon geographic price discrimination in which the defendant sold at a lower price in areas where it competed with the plaintiff and it did in areas where there was no competition.

Here, however, there is no claim that the defendant engaged in geographic price discrimination. In such circumstances the competitive injury requirement of a

claim under Section 2(a) can only be satisfied by (787) proof of predatory intent or a general market analysis. Plaintiff has not undertaken such an analysis.

The most recent primary line price discrimination cases that I have looked at have virtually eliminated any difference between an analysis under Section 2(a) of the Robinson-Patmon [*sic*] Act and Section 2 of the Sherman Act. I cite Janich Bros. v American Distilling Co., 570 F.2d, 848, and William Inglis & Sons v ITT Continental Baking Company, 461 F.Supp, 410.

The plaintiff's proof requirement for anticompetitive conduct under Section 2(a) of Robinson-Patmon [*sic*], I suggest, is precisely the same as for predatory pricing under Section 2 of the Sherman Act.

Now, we already covered that.

Plaintiff, I feel, has been unable to prove the defendant's prices were below average total cost, average variable cost and marginal costs and certainly has not proved predatory intent, and, therefore, the plaintiff's proof failed to prove the anticompetitive effect of the Robinson-Patmon [*sic*] discrimination claims.

Therefore, for those reasons I will grant the defendant's motion for involuntary dismissal under 41(b) and the defendant may present his order on that.

Thank you all very much.

ORDER OF DISMISSAL

(United States District Court —
Eastern District of Michigan —
Southern Division)

(D. E. Rogers Associates, Inc., a Michigan corporation and Michigan Specialties Manufacturing Company, Inc., a Michigan corporation, Plaintiffs, vs. Gardner-Denver Co., a Delaware corporation, Defendant — Civil Action No. 47222; Honorable Horace W. Gilmore)

At a session of said Court held in the Federal Building, Detroit, Michigan on Apr. 3, 1981.

Present: Honorable Horace W. Gilmore

Defendant Gardner-Denver Co. having moved, pursuant to Federal Rule of Civil Procedure 41(b), for dismissal at the close of plaintiff's presentation of evidence, the Court having heard the testimony, examined the record and made findings in its oral opinion rendered March 31, 1981, as provided in Federal Rule of Civil Procedure 52(a),

It Is Ordered that, for the reasons set forth in the March 31, 1981 Opinion, each of the three counts which were tried before this Court is dismissed with prejudice.

/s/ Horace W. Gilmore
United States District Judge

Approved as to form:

Miller, Canfield, Paddock and Stone

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(*Certification Omitted*)

SHERMAN ACT, SECTION 2

15 U.S.C. § 2

§ 2. *Monopolizing trade a felony; penalty*

Every person who shall monopolize, or attempt to monopolize, or combine with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

CLAYTON ACT, SECTIONS 2(a), (b) AS AMENDED BY THE ROBINSON-PATMAN ACT

15 U.S.C. §§ 13(a), (b)

§ 13. *Discrimination in price, services, or facilities – Price; selection of customers*

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition

with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however*, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

Burden of rebutting prima-facie case of discrimination

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished,

the burden or rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

No. 1698

In the Supreme Court of the United States

October Term, 1983

D. E. ROGERS ASSOCIATES, INC.,
and MICHIGAN SPECIALTIES
MANUFACTURING COMPANY,
Petitioners

v.

GARDNER-DENVER COMPANY,
Respondent.

**On Petition For Writ Of
Certiorari To The United States
Court Of Appeals For The Sixth Circuit**

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Two courts have already found that this case of aggressive price competition did not involve any action by respondent Gardner-Denver Company ("Gardner-Denver") that violated the antitrust laws. Indeed, the Court of Appeals for the Sixth Circuit stated that "we are not prepared to punish under any guise conduct which we conclude was well within the competitive boundaries the antitrust laws were enacted to protect." (A-16.) Because the findings below were largely of fact, and because this case raises no conflict among the circuits or with prior decisions of this Court, this Court should decline to issue its writ of certiorari.

Petitioners' (hereinafter "Rogers") description of the price competition existing between Rogers and Gardner-Denver between 1964 and 1976 is basically accurate, except for attribution to Gardner-Denver of unproved "anticompetitive motives." In 1974, Rogers filed this case, alleging that Gardner-Denver had violated Section 2 of the Sherman Act, 15 U.S.C. §2, and Section 2(a) of the Robinson-Patman Act, 15 U.S.C. §13(a). The case was tried to the district court without a jury, and was dismissed at the close of Rogers' proofs pursuant to Fed. R. Civ. P. 41(b). The district court held that Rogers failed to establish any violation of Section 2 of the Sherman Act or Section 2(a) of the Robinson-Patman Act. The district court found and concluded that: 1) the relevant product market included nutsetters of all kinds including ratchet wrenches and that there was no proof of monopoly power within that market (A-22 to A-24); 2) Rogers failed to show that any act of Gardner-Denver caused Rogers' alleged loss (A-24 to A-25); 3) Rogers had failed to show that Gardner-Denver priced its ratchet wrench replacement parts below average variable cost (A-25 to A-26); 4) there was no direct evidence of predatory intent (A-28 to A-29); and 5) the cost-based test for inferring anticompetitive effect from anticompetitive intent for purposes of §2(a) of the Robinson-Patman Act was

the same as that for determining intent to monopolize under Section 2 of the Sherman Act. (A-29 to A-30.)

The court of appeals did not reach the causation or relevant market issues, but affirmed the district court's other Sherman Act and Robinson-Patman Act findings and conclusions. Specifically, analyzing the case in terms of both an attempt to monopolize and monopolization, the court of appeals affirmed the finding of no direct evidence of intent or anticompetitive conduct from which predatory intent could be inferred. The court of appeals accepted the district court's finding that Gardner-Denver's reference to Rogers as a "pirate" manufacturer was a neutral description of a firm that manufactured replacements for equipment of another manufacturer and not evidence of predatory intent. (A-6.) The court held that Gardner-Denver was entitled to direct competitive price cuts at Rogers, and that Rogers had no right to force Gardner-Denver to maintain non-competitive prices. (A-7.).

The court also held that Rogers failed to show intent to monopolize by inference from predatory pricing, adopting the following test in the Sixth Circuit:

> [W]e hold that to establish predator [sic] pricing a plaintiff must prove that the anticipated benefits of defendant's price depended on its tendency to discipline or eliminate competition and thereby enhance the firm's long-term ability to reap the benefits of monopoly power. If the defendant's prices were below average total cost but above average variable cost, the plaintiff bears the burden of showing defendant's pricing was predatory. If, however, the plaintiff proves that the defendant's prices were below average variable cost, the plaintiff has established a prima facie case of predatory pricing and the burden shifts to the defendant to prove that the prices were justified without regard to any anticipated destructive effect they might have on competitors.

(A-9.) The court observed that Rogers' own expert could not say that Gardner-Denver's prices were below average variable cost, and that there was no other evidence sufficient to allow Rogers to carry its burden of showing that prices above average variable cost were predatory. (A-10.)

Finally, the Sixth Circuit held that where a plaintiff, like Rogers, sought to establish the "effect on competition" element of a Robinson-Patman §2(a) violation by inference from predatory pricing conduct, the test was the same as for monopolistic intent under §2 of the Sherman Act. (A-13 to A-16.)

ARGUMENT

I. ROGERS' "PREDATORY INTENT" ARGUMENT UNDER SECTION 2 OF THE SHERMAN ACT DOES NOT PRESENT ANY QUESTION WORTHY OF REVIEW, BUT MERELY ASKS THE COURT TO REVIEW THE EVIDENCE FOR A THIRD TIME.

This case does not present an issue worthy of review under Section 2 of the Sherman Act because of Rogers' crucial failure 1) to prove that Gardner-Denver priced its ratchet wrench replacement parts below average variable cost, or 2) to persuade either the district court or the court of appeals by direct evidence that Gardner-Denver had predatory intent. Rogers does not seriously argue a conflict among the circuits on the cost-based test of predatory intent. Instead, Rogers seeks a third review of the factual findings in contravention of the "two court" rule. *Berenyi v. District Director, Immigration & Naturalization Service*, 385 U.S. 630, 635-36 (1967).

As Rogers correctly notes, claims of monopolization and attempted monopolization under Section 2 require proof of general intent to monopolize and specific intent to monopolize, respectively. In the absence of direct evidence of such intent, one way in which plaintiffs have sought to

infer intent to monopolize from defendant's conduct is to show that the defendant has predatorily priced its product. The lower courts have agreed that "[p]ricing is predatory when a company foregoes short-term profits in order to develop a market position such that the company can later raise prices and recoup profits." *Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818, 823 (6th Cir. 1982); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1031-32 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 57 (1982).

Every circuit since 1975 reviewing predatory pricing claims where the defendant's prices are below average total cost has adopted a cost-based test under which the courts may infer predatory intent from pricing activity. As Rogers concedes, no circuit addressing the issue has failed to designate average variable cost as the crucial factor: if the defendant prices its product below average variable cost (those costs which vary with changes in output), it will be presumed to have engaged in predatory pricing.[1] Here, both the district court and the court of appeals agreed that Rogers failed to prove that Gardner-Denver priced the products at issue below average variable cost. (A-26; A-10.)

Most of the circuits have left open the issue how plaintiffs can prove predatory intent where prices are greater than average variable cost. The Sixth Circuit has, in the present case, adopted the Ninth Circuit's explicit burden-shifting formula. *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981), *cert.*

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[1] *D.E. Rogers Assocs., Inc. v. Gardner-Denver Co.*, 718 F.2d 1431 (6th Cir. 1983); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 103 S.Ct. 57 (1982); *Superturf, Inc. v. Monsanto Co.*, 660 F.2d 1275, 1281 (8th Cir. 1981); *O. Hommel Co. v. Ferro Corp.*, 659 F.2d 340 (3d Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982); *Northeastern Tel. Co. v. Am. Tel. & Tel. Co.*, 651 F.2d 76 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); *Chillicothe Sand & Gravel Co. v. Martin Marietta Corp.*, 615 F.2d 427 (7th Cir. 1980); *Pacific Eng'r & Prod. Co. v. Kerr-McGee Corp.*, 551 F.2d 790 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977); *Int'l Air Indus., Inc. v. Am. Excelsior Co.*, 517 F.2d 714 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976).

denied, 103 S. Ct. 57 (1982). If the defendant is shown to have priced its products above average variable cost but below average total cost (the total of fixed and variable costs divided by output), the burden is on plaintiff to show that the prices are predatory. If the prices are shown to be below average variable cost, however, the burden shifts to defendant to rebut the presumption that its prices were predatory. The other circuits have not yet addressed the burden-shifting test, but at least in cases involving prices lower than average total cost, the decisions among the circuits are not in conflict.[2]

In this case, Rogers failed to show intent to monopolize under any test. The district court and the court of appeals unanimously rejected Rogers' factual argument that there was direct evidence of predatory intent. (A-28; A-6.) Nor could either court find sufficient evidence from which predatory intent could be inferred. Within the context of the cost-based test adopted by the Sixth Circuit, Rogers could not satisfy its burden of showing that the prices were predatory, once it failed to show that Gardner-Denver priced below average variable cost.[3] Thus, the Sixth Circuit

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[2] Where prices are above average total cost, there may be a conflict among the circuits. In *Transamerica Computer Co. v. Int'l Bus. Mach. Corp.*, 698 F.2d 1377 (9th Cir.), *cert. denied*, 104 S. Ct. 370 (1983), the Ninth Circuit held that a plaintiff could show direct evidence of predatory intent even where prices were above average total cost. The First and Sixth Circuits rejected that position in *Arthur S. Langenderfer, Inc., v. S.E. Johnson Co.*, 1984-1 Trade Cas. (CCH) ¶65,905 (6th Cir. 1984), and *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983). Because the lower courts in this case found that plaintiffs failed to show direct evidence of any predatory intent, that issue is not presented here.

[3] Rogers quibbles over the Sixth Circuit's definition of "variable cost." The court declined to adopt a uniform definition and merely held that how a court should classify costs depends on the facts of each case. (A-11). The court rejected, on the facts of this case, Rogers' attempt to impose a cost definition that its own expert would not adopt. (A-10.) That holding is consistent with other circuits' treatment of cost accounting issues, *see Northeastern Tel. Co. v. Am. Tel. & Tel. Co.*, 651 F.2d 76, 89 n.19 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982), and not worthy of review.

affirmed dismissal of Rogers' case, even though it adopted a test different from that used by the district court.

Not surprisingly, then, Rogers' argument to this Court reduces to a plea for a third review of the evidence. Neither the district court nor the court of appeals believed Rogers' assertion that there was "abundant evidence that [Gardner-Denver] was attempting to damage Rogers and other small competitors and deter entry by others." Petitioners' Brief at 26. Rogers has shown no reason why it should be allowed to argue that evidence a third time in this Court.

II. THE HOLDING OF THE COURT OF APPEALS THAT ROGERS FAILED TO MAKE THE REQUIRED "EFFECT ON COMPETITION" SHOWING UNDER THE ROBINSON-PATMAN ACT RESTED ON ITS AFFIRMATION OF THE DISTRICT COURT'S FACTUAL FINDINGS, AND WAS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT OR THE COURTS OF APPEALS.

A. The Court of Appeals Affirmed The Finding That Rogers' Evidence Did Not Show That Price Discrimination Had Any Effect on Competition.

Section 2(a) of the Robinson-Patman Act, 15 U.S.C. 13(a), prohibits the sale of goods at discriminatory prices where such sale has an anticompetitive effect. Rogers' claim is of "primary line" price discrimination: as a manufacturer on the same distribution level with Gardner-Denver, Rogers claimed that the alleged price discrimination caused it to lose business.

A claimant under the Robinson-Patman Act must prove anticompetitive effect resulting from price discrimination.[4] In primary line cases, a plaintiff must establish the "effect on competition" requirement by a general market analysis

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[4] The existence of contemporaneous sales at different prices is not an issue in this case.

or by proof of anticompetitive intent from which the trier of fact may infer anticompetitive effect.[5] 16C von Kalinowski, *Antitrust Laws and Trade Regulation*, §29.01[4] (1983). As the district court and the court of appeals observed, Rogers did not undertake to prove effect on competition though a general market analysis. (A-30; A-14.) The lower courts further found that Rogers' evidence was insufficient to prove anticompetitive intent, either directly or under the cost-based test, from which anti-competitive effect could be inferred. Rogers' Robinson-Patman claim, like its Sherman Act claim, thus failed on its facts. Those factual questions are not worthy of another hearing.

B. The Court of Appeals' Application of the Cost-Based Test in a Robinson-Patman Section 2(a) Case Was Not in Conflict With Any Decision of This Court or of the Court of Appeals of Another Circuit.

Rogers claims that the court of appeals wrongly applied the cost-based test of predatory pricing in deciding whether "effect on competition" had been shown under Section 2(a). Rogers concedes, however, that the Sixth Circuit's application of the cost-based test is not in conflict with the holding of any other circuit. Petitioners' Brief at 14-15. Rogers claims instead that the decision conflicts with prior decisions of this Court. That assertion is not true.

First, *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967), cited by Rogers, involved geographic price discrimination, not predatory pricing. The Court held that the Robinson-Patman Act reaches price discrimination which erodes competition as well as price discrimination intended to have an immediate destructive impact. Moreover, the Court found that there was sufficient evidence from which

[5] Rogers agrees that virtually all previous primary line price discrimination claims have been premised upon geographic price discrimination, in which the defendant sold at a lower price in areas where it competed with plaintiff than it did in areas where it had no competition. *See, e.g., Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967). Rogers does not make a geographic price discrimination claim.

the jury could reasonably have found that the price discrimination would injure competition. That evidence included an analysis of the effect of below-cost pricing on the plaintiff and other competitors in the Salt Lake City frozen pie market. In the language that Rogers quotes out of context—that a particular price "was less than . . . direct cost plus an allocation for overhead" (*Id.* at 698)—the Court was merely describing one of the challenged prices. It was not stating a test for predatory pricing as a means of inferring anticompetitive effect from intent, in lieu of a market analysis (which Rogers chose not to undertake here). There is, therefore, no conflict between the court of appeals decision and *Utah Pie*.

Rogers also inexplicably cites several of this Court's decisions for the proposition that they "have upheld findings of price discrimination in violation of §2(a) with no proof at all of defendant's costs." Petitioners' Brief at 15. The existence of price discrimination is not an issue here; the only question is whether Rogers proved an anticompetitive intent sufficient to infer anticompetitive effect. None of the cited cases had anything to do with cost-based tests of predatory intent.[6]

Finally, the court of appeals correctly observed that the use of a cost-based test will not "immasculate" Section 2(a) of the Robinson-Patman Act. The cost-based test will be involved in §2(a) analysis only if the plaintiff chooses that

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[6]In *FTC v. Sun Oil Co.*, 371 U.S. 505 (1963), the Court held that a refiner-supplier of gasoline could not avail itself of the §2(b) "meeting competition" defense where it gave a discriminatory price to allow an independently-owned retail reseller to meet its retail competition. The Court held the defense to be applicable only to meet the price reductions of the supplier's own competitors. In *Standard Oil Co. v. FTC*, 340 U.S. 231 (1951), the Court held that the §2(b) defense was a complete defense, and not merely a rebuttable defense to the prima facie case of price differential. In *Corn Products Refining Co. v. FTC*, 324 U.S. 726 (1945), the Court held that "basing point" systems of pricing constituted price discrimination within the prohibition of §2(a), and that there was sufficient evidence of the anticompetitive effect of the system to support the Commission's cease and desist order.

method, as Rogers did here, to prove the anticompetitive effect of price discrimination in a nongeographic, primary line case. Even then, the plaintiff must show price discrimination to satisfy §2(a), on the one hand, and monopoly power in a relevant market (or a dangerous probability of attaining such power) to prevail under Section 2 of the Sherman Act, on the other. The court of appeals has hardly "judicially repealed" Section 2(a), and the suggestion that it has is not worthy of review by this Court.

CONCLUSION

For the reasons stated above, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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Dated: May 17, 1984